need not make any more tapes unless Sabo called her. The detective made no inquiries about Lawrence's threats and demands for cash made during the initial calls. Id.

10. Notwithstanding his suggestion to "leave it alone," Coale provided Lawrence with a second government-owned recorder and more blank tapes for her home and office. Appendix, at A55.

11. Lawrence placed additional calls to Sabo using the police-provided equipment. Id.

12. Coale continued to meet with Lawrence about her new efforts to record conversations with Sabo, and he provided her with more blank tapes. He did not question her regarding her new efforts to contact Sabo. Appendix, at A56.

13. Not all of her threats were recorded and many others were erased. In fact, Lawrence intentionally erased entire conversations. Appendix, at A57.

14. In the telephone calls containing the incriminating statements, made only days after the initial call, Sabo was "in a complete panic that [she] had begun implementing her threats," he was "absolutely hysterical" and "talking about killing himself." Lawrence recorded these conversations in accordance with her instructions. Appendix, at A58.

In brief, therefore, the Arlington police provided government recording equipment to a private citizen with the express instruction that she record conversations with the only subject of their criminal investigation (i.e., *Skinner*). Lawrence did not act wholly on her own initiative (i.e., *Coolidge, Jarrett*), took no action to contact Sabo before

instructed to do so by the police (i.e., *Feffer, Smith*), and acted in pursuance of an endeavor to justify a search warrant (i.e., *Stone*).

Only after Lawrence made numerous threats and promises – threats known by the police after listening to the recordings – did the police suggest she discontinue her efforts. Even then, they provided her with more equipment. Based on this later advice to "leave it alone," lower courts determined she was not a government agent. The Virginia court even concluded, contrary to this Court's guidance of "encourage[ment], endorse[ment], and participat[ion], that she was never "directed her to do anything." *Sabo v. Commonwealth*, 38 Va.App. 63, 75-76 (2002). Appendix, at A30. Neither the prosecution nor the defense agreed with this conclusion. The prosecutor even referred to the police command as an "instruction" to Lawrence. Appendix, at A50.

The after-the-fact suggestion to "leave it alone" does not immunize the government of their responsibility for the threats made to Sabo while under the initial police instructions. To avoid the encouragement, endorsement, and participation standard, the ruling by the U.S. District Court hints that Lawrence obtained the recording equipment as innocently as one would check a book out of a public library.[1] Under their "directed" argument, the police can

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[1] Citing *Colorado v. Connelly*, (479 U.S. 157, 167 (1986)), the District Court points out that even the most outrageous conduct by a private citizen does not run afoul of the Constitution but for coercive police activity. The District Court ignores the full involvement by the Arlington police in this matter. The police provided Lawrence with a recorder and asked her to seek a recorded statement from Sabo, despite their knowledge that Lawrence and Sabo had an anguish-filled relationship, that Lawrence had been abusive

provide and install recording equipment, discuss the need for a recorded admission, instruct a private citizen to collect evidence, and later review the results of her investigative efforts – and avoid any agency responsibility by disclaiming her efforts after-the-fact. In Virginia's version of reality, her actions would be of her "own volition" (i.e., *Coolidge*) because the police subsequently suggested she "leave it alone." All of the encouragement and sponsorship in the world would founder under Virginia's "directed" standard. Virginia's appellate court Judge Benton said it best,

> The evidence in the record established very clearly that the police initiated the process leading to the recording of Sabo's conversations with Lawrence, that the police provided Lawrence with a tape recorder so she could record her conversations with Sabo, that the police did so for the purpose of furthering their investigation, and that the police used Lawrence as their surrogate in effecting the ends of their investigation. The trial judge's conclusions that the "minimal" involvement of the police was insufficient to prove Lawrence was an agent of the police is not supported by the evidence. Appendix, at A39.

The only reasonable conclusion here is that Virginia's courts do not believe that law enforcement officials should be constrained by restrictions of common law agency jurisprudence. This is simply unreasonable, utterly nonsensical, and totally inconsistent with prior rulings of this and lower Federal courts.

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to Sabo, and that Sabo suffered from clinical depression. After listening to the initial recordings, they even provided Lawrence with additional recording equipment. Coercive police conduct is hardly absent here.

Had the police *never* instructed Lawrence to make the telephone calls, had they specifically instructed her not to use coercive efforts, had they instructed her to leave it alone *before* the threats were made, the agency may not have been created.[2] These, however, are not the facts.

B. The Lower Court's Analysis of Coercion Improperly Calls for a Balancing Test. A Defendant Should Not Be Forced To Choose the Lesser of Two Evils.

In determining whether a defendant's statements are voluntary, and whether one's will has been overborne, trial courts access each matter on a case-by-case basis based on the totality of the record. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). A confession is like no other evidence. It is probably the most probative and damaging evidence that can be admitted against him, and, if it is a full confession,[3] a jury may be tempted to rely on it alone in

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[2] Petitioner does not concede that the agency relationship ended once the police suggested Lawrence "leave it alone." By providing the equipment and instructing Lawrence to collect evidence, the Arlington police set in motion a chain of events that, when coupled with the threats, promises, and demands for a cash payment, eventually produced incriminating statements. This chain was only strengthened when the police gave Lawrence a second recording device and additional blank tapes. Only the removal of the recording equipment in Lawrence's home would have terminated the relationship. Even then, however, the government would still be held liable under agency jurisprudence for the threats made during the initial conversations.

[3] The record shows that Sabo's incriminating statements were incomplete and factually wrong. Arlington Detective

reaching its decision. The risk that a coerced confession is unreliable, coupled with the profound impact that it has upon the jury, requires a reviewing court to exercise extreme caution before determining that the confession's admission was harmless. *Arizona v. Fulminante*, 499 U.S. 279, 295-296 (1991).

In *Fulminante*, the defendant's confession to an agent of the government was involuntary in that he was motivated to confess by fear of physical violence. Fulminante's second confession to the agent's wife months later is also probative here in that Sabo's utterance of incriminatory statements only several days after the threats were made was deemed sufficient by the District Court to make them voluntary. *Id.*, at 284.

It is well understood that confessions *must* be voluntary. The government must present credible evidence to show that a statement was made under circumstances free of coercion and duress, and untainted by promises of reward or leniency. The question is whether the accused was deprived of his "free choice to admit, to deny, or to refuse to answer," *Lisenba v. California*, 314 U.S. 219, 241 (1941).

No such credible evidence was offered; just the opposite in fact. It is undisputed that the threats, demands for cash, and promises of leniency were proffered by Lawrence during her first, police-instructed, conversation,

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John Coale testified, after interviewing Lawrence and listening to the audiotapes, that Sabo never stated accurately what happened to Lawrence's vehicle. Nov. 3, 1999 at 9. The recorded conversations reveal that Sabo incorrectly identified specific matters related to Lawrence's vehicle, such as where it was parked and the manner in which it had been tampered. Audiotape of April 21-22, 1999. Note that in *Lisenba*, the Court stated, "The aim of the rule that a confession is inadmissible unless it was voluntary made is exclude false evidence." *Lisenba*, at 236.

and that Sabo's incriminating statements came as a result of those threats. When called as a witness by the Commonwealth, Lawrence specifically testified that Sabo's incriminating-statement-filled conversation initiated as a direct result of her threats and promises. Sabo was "in a complete panic that [she] had begun implementing her threats," he was "absolutely hysterical" and "talking about killing himself." Appendix, at A58-59.

What exactly were these numerous threats and promises not to involve the police? The list is immense and coarse by any standard. "Most" of them were made during the first telephone call placed at the instruction of a police detective.

1. Lawrence promised not to involve the police if Sabo admitted to causing her accident.[4] Appendix, at A60.

2. Lawrence threatened to falsely tell Sabo's wife that their relationship began before they separated. Appendix, at A61.

3. Lawrence threatened to interfere with Sabo's visitation rights with his daughter, which were then being negotiated.[5] Appendix, at A62.

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[4] The District Court argued, "Lawrence was never in a position to offer immunity to Sabo from prosecution." While this is obviously true, the record, however, shows that Lawrence's threat was not to "offer immunity" but that she would not involve the police -- a promise she certainly was in a position to keep.

[5] The District Court states, "there has never been any indication that Lawrence had any control over his visitation rights and he was already divorced from his wife at the time." The record is clear, however, that Sabo was merely separated and not divorced, at the time in question.

4. Lawrence threatened to seek to have Sabo terminated from his job by filing a false sexual harassment claim.[6] Appendix, at A65.

5. Lawrence threatened to damage Sabo's political reputation by making a false allegation to then

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Appendix at A62-63. It is uncontested that Lawrence's threat was to ensure that Sabo's daughter felt the same sense of abandonment felt by Lawrence when her parents divorced -- hardly a threat requiring legal control over visitation. Appendix, at A63. The District Court incorrectly states that Sabo was already divorced at the time of these threats. In any event, the U.S. Supreme Court ruled in *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963), that threats to interfere with an individual's custody of a child as a means to elicit an admission will cause a confession to be deemed not voluntary, but coerced.

[6] The Federal District Court suggests, "As for threats relating to his career, it appears unreasonable to think that a false claim of sexual harassment would prove more injurious to Sabo than confessing to a crime of violence." The Court misapplies U.S. Supreme Court precedent by suggesting that Sabo should have viewed the false sexual harassment threat of Lawrence by a balancing test. The Supreme Court directly addressed the issue of self-incrimination versus job-forfeiture in *Garrity v. New Jersey*, 385 U.S. 493 (1967). There, the Court indicated that a defendant should not have to make such a choice and, as such, incriminating statements are coerced if one is forced to choose between making an incriminating statement or risk losing their employment. Lawrence's threat of filing a false sexual harassment claim with their joint employer was specifically designed, she admitted, to threaten Sabo's employment.

Virginia Governor James Gilmore, his friend, that Sabo had refused to recommend her for a government board appointment until she slept with him. Appendix, at A67.

6. Lawrence threatened to pursue false, unspecified charges with the bar association leading to Sabo's disbarment. Appendix, at A69.

7. Lawrence promised not to bring civil charges against Sabo if he provided her the requested admission.[7] Id.

8. Lawrence told Sabo he "need[ed] to have his life fucked up a little bit." Appendix, at A70.

9. Lawrence demanded a cash payment of $2,000.00 to end her harassment. Appendix, at A71.

10. Lawrence encouraged him to embezzle the money from the Virginia government through his position as a commissioner on the Commonwealth Transportation Board. Appendix, at A72.

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[7] Days after Sabo's conviction, Lawrence filed a civil case in the Arlington Circuit Court seeking some $3.5 million in damages. That suit, also heard by Judge Joanne Alper, was later dismissed. Sabo proceeded *pro se*. Arlington Circuit Court, At Law No. 01-213, Dismissed: Nov. 22, 2002.

Although the incriminating statements came a couple days later, even Lawrence agreed that the aggregate result of the threats put Sabo, to paraphrase her testimony, in a state of "panic" with talk of "killing" himself. This, petitioner contends, is the operative fact. The question is not whether some unknown reasonable man felt coerced, but whether Sabo felt coerced. Lawrence, testifying for the government, answered that question in the affirmative.

The only Virginia appellate judge to review the voluntariness of the statements concluded, "[t]his evidence proved that Sabo's admissions were obtained by duress, threats, and sympathy falsely aroused and, thus, failed to prove Sabo's admissions were voluntary." *Sabo*, 38 Va.App. at 89, 561 S.E.2d at 773. Appendix at A44.

The District Court however, ruled, "[a]s for threats relating to his career, it appears unreasonable to think that a false claim of sexual harassment would prove more injurious to Sabo than confessing to a crime of violence." The District Court misapplies *Lisenba* by suggesting that Sabo should have viewed the false sexual harassment threat of Lawrence through some sort of balancing test.

To date, not a single court at any level has addressed the coercive effect of demanding a cash payment in exchange for ending the numerous false threats or Lawrence's suggestion to Sabo that he embezzle money from the government of Virginia to pay her demand. Likewise, no court has addressed the collective effect of the multiple threats and Sabo's diagnosed manic depressive state, which was known and discussed by the police and Lawrence. Nov. 3, 1999 at 23, Nov. 29, 1999 at 211. The Supreme Court's requirement under *Bustamonte*, supra, is to consider the totality of the circumstances and not just the impact or reasonableness of any individual threat.

While finding that the police exercised no control or authority over Lawrence, and could not therefore be an agent of the government, neither the Virginia court nor the District Court reveal that all the conversations were recorded on equipment provided, installed, tested, and instructed by the government. The police told Lawrence to make contact with Sabo and record their conversations, and she carried out that instruction. At that moment, she became an agent of the government. Hence, the threats, demands for cash, and promises not to involve the police became the responsibility of the government. When those resulted in incriminating statements, the government cannot hide itself from constitutional liability.

Concluding that these facts do not result in an agency relationship, and that Sabo could choose between two guaranteed rights, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

C. Misconduct of Virginia Attorney General, in Presenting Facts Previously Conceded to be Untrue, Denied Kevin Sabo's Due Process Rights. Prior Supreme Court Rulings and a Miscarriage of Justice Supports Review of this Claim.

The U.S. District Court refused to consider Sabo's claim that intentional, false statements by the Attorney General of Virginia was a violation of his due process rights. The Court reasoned that Sabo failed to present this claim to Virginia State courts and also failed to show that the government's misdeeds would result in a miscarriage of justice.

The false statements by the Virginia Attorney General were knowing and intentional -- the obvious result of a determination that the concession by the local prosecutor

would jeopardize Sabo's conviction upon appeal. Furthermore, when confronted with evidence of these wrongful acts before the District Court, the Virginia Attorney General continued to deny that the prior pronouncements were made or, if made, perhaps had been misunderstood by the Petitioner. It was left to the Petitioner to provide the District Court with the complete record of Virginia's trial court concessions.

It may be helpful to review the precise manner in which the Commonwealth presented one set of facts to a jury regarding the veracity of its key witness, and an opposite set of facts to Virginia's appellate court. Arlington Detective John Coale initially testified that he had instructed Lawrence to make no attempt to contact Sabo. Following the conflicting testimony of Lawrence, who told how she was told directly by Coale to contact the defendant and that a recorded admission would help secure an arrest warrant, the Detective then admitted that he could not remember the exact instructions given. Faced with the need to resolve the conflicting testimony between its two key witnesses, the prosecutor clearly sided with Lawrence. The Commonwealth's Attorney stipulated,

> . . . it's our position ... that she had been told ... make a phone call and see if you get anything on there ... and then following that ... only tape if he calls. Nov. 3, 1999, at Pg. 11.

As if there was any ambiguity, the Commonwealth's Attorney repeated this declaration in a signed, written brief to Virginia's Court of Appeals arguing against the granting of a direct appeal. She specifically referred to the request of the police as an "instruction," stating:

> The only *instruction* she received from Det. Coale concerning the taping of calls was 'to tape record the

> first conversation with [the defendant] but not to contact him otherwise.' Appendix, at A50. (Emphasis added.)

The prosecutor cited Lawrence's testimony describing in great detail the extensive efforts of the police to install and test a recording system, and instruct her to use it to seek an admission. At this point, the agency relationship was created -- the police had "encourage[d], initiate[d] or instigate[d]" Lawrence's efforts. (see, *Jarrett*, discussed supra).

Based in part on the prosecutor's initial declaration -- and similar assurances privately to defense counsel -- it was well understood during the trial that the Commonwealth's position was that the police had instructed Lawrence to make the first telephone call. Given the detective's revised testimony, no evidence existed suggesting otherwise. No evidence was presented to the jury suggesting that Lawrence was told not to contact Sabo.[8]

When a direct appeal was granted, and the matter transferred to the jurisdiction of Virginia's Attorney General, the implications of the startling admissions were recognized. Hiding behind quotes they had earlier admitted were false, the Attorney General argued:

> Coale then provided Lawrence with a tape recorder in order 'to tape anything that might – and phone calls that she might receive.' *He told Lawrence not to contact the defendant*, but if he called and she wanted

[8] Under the Attorney General's argument, the prosecutor made a false statement when she gave private assurances to Sabo and, worse still, suborned perjury when she permitted Lawrence to testify contrary to the known facts. Either Sabo's due process rights were denied at trial, or they were denied on appeal.

> to make the tapes 'that would be useful to our investigation.' (Emphasis added.)

He repeated this false argument,

> The calls were initiated either by the defendant or by the victim, contrary to the instructions of the police. The police did no more than provide and install the recording equipment and provide cassette tapes.

And again,

> In her actions, the victim first overrode the instructions of the police that she *not call the defendant.* (Emphasis added.)

Finally, in yet another instance,

> . . . governmental involvement was minimal. *Having installed the equipment and provided the tapes, the police did no more.* (Emphasis added.)

These arguments are false. We know this because the Commonwealth's Attorney for Arlington County admitted to the trial and appellate courts they were false. Nowhere -- not in his Summary of Facts, Arguments, or even in a lowly footnote -- did the Attorney General truthfully argue that the police instructed Lawrence to use government equipment to collect evidence from Sabo. Instead, he deceitfully argued the opposite. Because no other evidence supported it, the determination by the Virginia appellate court that the police "suggested" Lawrence record the conversations could only have come from the Attorney General's deceitful brief.

Prior to filing the Federal habeas petition, Sabo first turned to Virginia's courts to seek relief. That effort was

deemed moot, however, when he was released from custody. In this regard, Sabo relied on the 4th Circuit's ruling in *Morgan v. Juvenile*, 491 F.2d 456 (1974),

> We do not feel that the exhaustion of remedies principle requires that [petitioner] present his claim to the state courts. Since he no longer is imprisoned, Dretke [petitioner] has no state remedy currently available to him by reason of the recent ruling of the Virginia Supreme Court. ..

Second, Sabo respectfully argues that a fundamental miscarriage of justice would occur absent review of this claim. Had the Virginia appellate courts properly recognized Lawrence as a government agent, in light of the prosecutor's admission, Sabo's conviction would surely have been reversed. As discussed above, Lawrence, the government's own witness, testified that she performed this task with the goal of obtaining a search warrant and prosecuting Sabo.

The Commonwealth and, now, the District Court, contends Sabo should have filed the claim regarding the false statements during the direct appeal. In other words, the burden lies with Sabo to ensure the Commonwealth told the truth. Such an argument is nonsensical, has been rejected by this Court throughout time, and should be rejected again here. Furthermore, the false statements by the Commonwealth continued in proceedings before the District Court, although that court took no action to compel the truth when it was brought to their attention. The government of Virginia has a responsibility to tell the truth regardless of the pleadings of an appellant -- in fact, we now know Sabo was the only party to truthfully present his argument before the Virginia and District courts.

How many times has this Court been forced to remind law enforcement authorities of the responsibility they have to the truth? This Court has spoken frequently of the "special role played by the American prosecutor in the search for truth in criminal trials." *Banks v. Dretke*, 540 U.S. 668, 696 (2004)(quoting *Strickler v. Greene*, 527 U.S., 263, at 281). It has long been established that the government's "deliberate deception of a court . . . by the presentation of known false evidence is incompatible with rudimentary demands of justice." *Giglio v. United States*, 405 U.S. 150, 153 (1972)(quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)(*per curiam*). Although *Banks* presented a *Brady* claim, the principle remains the same.

The government's "special role" for honesty, veracity, and the search of the truth does not end at the appellate court's door. No act -- or alleged lack of action -- by the Petitioner during the direct appeal justifies the Commonwealth presenting known false evidence. Rule 3.3(a) of the Virginia Rules of Professional Conduct provides, inter alia, "A lawyer shall not knowingly . . . make a false statement of fact . . . to a tribunal." The accompanying comment provides, "a lawyer's signature on a pleading constitutes a certification that the lawyer believes, after reasonable inquiry, that there is a factual and legal basis for the pleading." In this case we have one signed government pleading that Lawrence was "instructed" to call Sabo and another signed government pleading that Lawrence was instructed NOT to call Sabo.

The record clearly demonstrates the Commonwealth misled the Virginia Court of Appeals during Sabo's appeal and that action resulted in persuading that court to rule Sabo's incriminating statements to be admissible.

Assuming, arguendo, that Virginia's Attorney General is correct, and that Lawrence was instructed NOT to contact Mr. Sabo, the Commonwealth still denied Sabo's right to due process by presenting evidence at trial it knew was false. The Commonwealth in statements to the trial court, and private assurances to defense counsel, attested to the veracity of the instructions given Lawrence to place that first telephone call to Sabo. Had the defense not been misled by the Commonwealth's attorney that they were permitting false testimony, such efforts would have been challenged at trial.

D. Failure to Allow Dr. Brantley to Testify at Trial so that the Jury Could Determine What Weight and Value to Give to the Statements Violated Due Process Rights.

Mr. Sabo wanted Dr. Julian Brantley to testify on his behalf with regard to the weight that the jury should give his recorded statements. The trial judge had already denied a Motion to Suppress despite Dr. Brantley's testimony that the statements were involuntary. The *Sabo* majority in Virginia's appellate court erroneously ruled that he intended to again testify on the question of whether the statements were voluntary before the jury. This would have been improper, but it is not what he was called to do. Rather, his role before the jury was to give testimony calling into question the reliability of the statements.

As the dissenting opinion in *Sabo* found, the defense wanted to call an expert to prove that his mental condition

made his statements unreliable. Relying on heretofore Virginia Supreme Court precedent, "while the [trial judge] has the duty to determine whether [a defendant's] confession was voluntary, it is the jury's duty to consider its reliability." *Pritchett v. Commonwealth*, 263 Va. 182, 186, 557 S.E.2d 205, 208 (2002). This Court said just that in *Crane v. Kentucky*, 476 U.S. 683 (1986). There, the Court noted that "the . . . psychological environment that yielded the confession can . . . be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence."

Although the proffer of the defendant may have brushed up against some issues which would have been objectionable, the clear purpose of Dr. Brantley's testimony, and the state purpose of Sabo's counsel in offering it, was to give weight to the reliability of Sabo's incriminating statements. Defense counsel argued,

> ". . . now this confession or admission must be given the weight it should receive." (November 29, 1999 at Page 60).
>
> ". . . he would testify as to the conditions that are accompanying these disorders, and that he was overborne or more susceptible to being overborne than a normal person would have been." (Id. at 61).
>
> "I think that the issue becomes the weight to be attributed to those admissions." (Id., at 61).

The Commonwealth argued at trial that no testimony should be admissible regardless of whether it went to voluntariness or reliability. The trial court agreed, saying, "I don't think Dr. Brantley can get up here and testify." (Id., at 62). As Virginia appellate court judge Benton stated,

> The error in not permitting the expert to testify concerning Sabo's illness was not harmless error. Although Sabo attempted to describe his illness for the jury, his testimony did not have the same effect of an expert who could more accurately explain Sabo's mental state and its effect on his functioning. Furthermore, while Sabo's statement and characterization of his illness may have been viewed by the jury as self-serving, Dr. Brantley's testimony and description of the illness would not have been so perceived and could have provided enhanced reliability for the jury to consider. Therefore, I would hold the judge committed reversible error in not allowing portions of Dr. Brantley's testimony. Appendix, at A47.

CONCLUSION

There is no DNA evidence in this case to prove the pleas of an innocent man. All we have are the historic rules designed to ensure the integrity of a coerced confession. The District Court ruling runs contrary to common sense. Heather Lawrence did not develop the idea of obtaining a recorded admission on her own accord; nor did she use her own recording equipment. The idea and resources were provided by the police. The dissenting view in the Virginia appellate case, worthy of careful review, states it best:

> I would hold that this record contains clear and unequivocal evidence of the government's encouragement, endorsement, and participation" in Lawrence's activity of eliciting admissions from Sabo, and recording them. *Skinner*, 489 U.S. at 615-16, 109 S.Ct. 1402. This evidence was sufficient to prove she was a police agent and to implicate the Fifth Amendment. Appendix, at A 40.

It is uncontested by both the prosecution and defense of Kevin Sabo that the Arlington County police solicited a private citizen to collect evidence on their behalf. In doing so, this private citizen employed numerous, grotesque threats, promises of leniency, and demands for cash as a means to encourage Sabo to "confess" to a crime he otherwise denied. Her own testimony proves that Sabo's resulting statements were made under "fear" that the threats were being carried out. Yet, the Commonwealth wants to avoid any liability for her actions simply because several days after she made the threats, they told her to make no further telephone calls.

As we have argued, however, that toothpaste has already been squeezed out of the tube. No existing agency law theory can put it back; nor can the efforts of Virginia's Attorney General to fabricate new facts during direct appeal.

Efforts to stretch the law beyond recognition as designed by the Commonwealth of Virginia cry out of supervision by this Court.

Respectfully Submitted,

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571-216-4536

APPENDIX
TABLE OF CONTENTS

Order Denying Petition for Rehearing and Rehearing En Banc from the U.S. Court of Appeals for the Fourth Circuit A1

Judgment Denying Application for a Certificate of Appealability from the U.S. Court of Appeals for the Fourth Circuit A2

Unpublished Per Curiam Opinion of the United States Court of Appeals For the Fourth Circuit A3

Order of the United States District Court for the Eastern District of Virginia A5

Unpublished Memorandum Opinion to Dismiss Petition for Writ of Habeas Corpus from the United States District Court from the Eastern District of Virginia A6

Kevin Mark Sabo v. Commonwealth of Virginia, from the Virginia Court of Appeals, Record No. 0538-00-4 A22

Record from the Trial Court Regarding the Alleged Agency Relationship A48

Record from the Trial Court Regarding the Coercive Effect of Threats, Promises of leniency, and Demands for a Cash Payment A60

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed
September 27, 2005

No. 05-6574
CA-03-276-1

KEVIN MARK SABO
Petitioner – Appellant

v.

BETH ARTHUR, The Honorable, Sheriff, Arlington County, Virginia
Respondent – Appellee

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Widener, Judge Williams, and Judge Michael.

For the Court,
/s/ Patricia S. Connor

Clerk

JUDGMENT

FILED: August 25, 2005

UNITED STATES COURT OF APPEALS

For the

Fourth Circuit

No. 05-6574

CA-03-276-1

KEVIN MARK SABO

Petitioner – Appellant

v.

BETH ARTHUR, The Honorable, Sheriff, Arlington County, Virginia

Respondent – Appellee

Appeal from the United States District Court for the Eastern District of Virginia at Alexandria

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In accordance with the written opinion of this Court filed this day, the Court denies a certificate of appealability and dismisses the appeal.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor

_____

CLERK

UNPLUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-6574

KEVIN MARK SABO

Petitioner – Appellant

versus

BETH ARTHUR, The Honorable, Sheriff, Arlington County, Virginia

Respondent – Appellee

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, Senior District Judge. (CA-03-276-1)

Submitted: August 18, 2005 Decided: August 25, 2005

Before WIDENER, WILLIAMS, and MICHAEL, Circuit Judges

Dismissed by unpublished per curiam opinion.

Kevin Mark Sabo, Appellant Pro Se. Eugene Murphy, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Kevin Mark Sabo seeks to appeal the district court's order denying relief on his petition filed under 28 U.S.C. § 2254 (2000). An appeal may not be taken from the final order in a § 2254 proceeding unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1) (2000). A certificate of appealability will not issue for claims addressed by a district court absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2000). A prisoner satisfies this standard by demonstrating that reasonable jurists would find both that his constitutional claims are debatable and that any dispositive procedural rulings by the district court are also debatable or wrong. See Miller-El v. Cockrell, 537 U.S. 322, 336 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Rose v. Lee, 252 F.3d 676, 683 (4th Cir. 2001). We have independently reviewed the record and conclude that Sabo has not made the requisite showing. Accordingly, we deny Sabo's motion for a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the final decisional process.

DISMISSED

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

KEVIN MARK SABO, Petitioner,	)	
v.	)	ACTION NO. 1:03CV276
SHERIFF, COUNTY OF ARLINGTON, et. al.	)	(JCC)
Respondent.	)	

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby **ORDERED** that respondent's Motion to Dismiss (doc. No. 10) is **GRANTED** and this petition is **DISMISSED**.

Should petitioner wish to appeal, petitioner must file a notice of appeal within thirty (30) days of the date of this Order. Petitioner must also request a certificate of appealability from a circuit justice or judge. See 28 U.S.C. § 2253 and Fed. R. App. P. 22(b). For reasons stated in the accompanying Memorandum Opinion, this Court expressly declines to issue such a certificate.

The Clerk is DIRECTED to send a copy of this Order to petitioner and counsel of record for respondent.

Dated: 3/21/05
Alexandria, Virginia

/s/ James C. Cacheris
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

KEVIN MARK SABO, Petitioner,	)	
v.	)	ACTION NO. 1:03CV276
SHERIFF, COUNTY OF ARLINGTON, et. al. Respondent.	)	(JCC)

MEMORANDUM OPINION

Petitioner, Kevin Mark Sabo ("Sabo"), a former Virginia inmate proceeding pro se, filed this Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 challenging the validity of his conviction for attempted malicious wounding in the Circuit Court of the Arlington County, Virginia. On February 3, 2004, Sabo informed this Court that he was no longer in custody, and this Court asked Sabo to show cause why his petition was not moot. On March 8, 2004, Sabo argued his petition was not moot due to the collateral consequences of his conviction including the revocation of his licenses to practice law, the inability to obtain a professional license, and the loss of the right to vote. This Court agreed by Order dated April 19, 2003. On June 2, 2004, respondent filed a Motion to Dismiss and Rule 5 Answer. Sabo was given the opportunity to file responsive materials, pursuant to Roseboro v. Garrison, 528 F2d 309 (4th Cir. 1975), and has filed a response. Additionally, respondent filed a reply to Sabo's response on June 30, 2004. Accordingly, this matter is now ripe for disposition. For the reasons that follow, Sabo's claims must be dismissed.

I. Background

On January 28, 2000, Sabo was convicted of attempted malicious wounding in the Circuit Court of Arlington County. He was sentenced to eighteen months of incarceration and has now fully served his sentence. Sabo pursued a direct appeal to the Court of Appeals of Virginia, which affirmed his conviction on April 9, 2002. Sabo v. Commonwealth, R. No. 0538-00-4 (Va. Ct. App. Apr. 9, (2002). On October 23, 2002, the Virginia Supreme Court denied Sabo's petition for appeal. Sabo v. Commonwealth, R. No. 021767 (Va. Oct. 23, 2002).

Sabo then pursued a habeas corpus petition to the Court of Appeals of Virginia in December 2002, and the court dismissed Sabo's petition on April 23, 2003, referring it to the appropriate Circuit Court. Sabo v. Commonwealth, R. No. 3283-02-4 (Va. App. Apr. 23, 2003). On May 1, 2003, Sabo filed a habeas corpus petition in the Circuit Court of Arlington County, and the Circuit Court notified Sabo by letter dated January 23, 2004 that it would not consider his petition because he was no longer in custody. Sabo did not appeal this response to the Virginia Supreme Court. On March 4, 2003, Sabo filed the instant federal habeas corpus petition asserting the following claims:

(A) The Commonwealth knowingly provided false statements of fact to the Virginia Court of Appeals which denied the petitioner his rights under the federal Constitution,

(B) Sabo's conviction was obtained through the use of a coerced confession,

(C) Sabo's conviction was obtained through the use of an altered audiotape, and

(D) Sabo was denied his right to challenge "the weight and value a jury should give involuntary statements."

On June 2, 2004, respondent filed a Motion to Dismiss Sabo's claims. Sabo has filed a response. Accordingly, this matter is now ripe for review.

II. Exhaustion and Procedural Default

In reviewing a petition brought pursuant to 28 U.S.C. § 2254, a federal court must determine whether the petitioner has exhausted his claims before the appropriate state courts and whether those claims are barred by a procedural default. As a general rule, a petitioner must first exhaust his claims in state court because exhaustion is a matter of comity to the state courts; failure to exhaust requires dismissal from federal court so that the petitioner may present his claims to the state courts. See Granberry v. Greer, 481 U.S. 1229, 134 (1987); Rose v. Lundy, 455 U.S. 509 515-19 (1982); 28 U.S.C. § 2254(b). To comply with the exhaustion requirement, a state prisoner "must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). Thus, petitioner must present the same factual and legal claims raised in the instant petition to the Supreme Court of Virginia either by way of (i) a direct appeal, (ii) a state habeas corpus petition, or (iii) an appeal from a circuit court's denial of a state habeas petition.

This, however, does not end the exhaustion analysis because "[a] claim that has not been presented to the highest state court nevertheless may be treated as exhausted if it is clear that the claim would be procedurally barred under state law if the petitioner attempted to present it to the state court." Baker v. Corcoran, 220 F. 3d 276, 288 (4th Cir. 2000)(citing Gray v. Netherland, 518 U.S. 152, 161 (1996)). Importantly, "[h]owever, the procedural bar that gives rise to exhaustion provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas review of the defaulted claim." Id. (quoting Gray, 518 U.S. at 162). A petitioner may nonetheless overcome procedural defaults, and have his claims address on the merits, by showing either cause and prejudice for the default, or that miscarriage of justice would result from the lack of such review. See Coleman v. Thompson, 501 U.S.

722, 750 (1991); Savino v. Murray, 82 F. 3d 593, 602, (4th Cir. 1996). The existence of cause ordinarily turns upon a showing of: (1) a denial of effective assistance of counsel, (2) a factor external to the defense which impeded compliance with the state procedural rule, or (3) the novelty of the claim. See Coleman, 501 U.S. at 753-54; Clozza v. Murray, 913 F 2d 1092, 1104 (4th Cir. 1990); Clanton v. Muncy, 845 F 2d 1238, 1241-42 (4th Cir. 1988).

A. Claim (A)

A review of the record discloses that Sabo has failed to exhaust his claim of prosecutorial misconduct by presenting to the Supreme Court of Virginia. As respondent correctly argues, Sabo has procedurally defaulted on the claim he presented in his state habeas petition because he did not appeal the circuit court's adverse ruling to the Supreme Court of Virginia. See Whitley v. Blair, 802 F2d 1487, 1500 (4th Cir. 1986). (holding that failure to appeal claims disposed of by state habeas trial court constitutes a procedural bar to further federal review). Furthermore, Sabo's claim of prosecutorial misconduct would now be procedurally barred under Virginia Code § 8.01-654(A)(2), which provides a one-year statute of limitations for filing a state habeas petition. Moreover, these claims would also be procedurally barred pursuant to Virginia Code § 8.01-654 (B)(2), which requires that petitions for state habeas relief, 'contain all allegations the facts of which are know to petitioner at the time of filing" and bars successive habeas petitions containing such allegations. Thus, this claim must be treated as simultaneously exhausted and procedurally barred from federal habeas review absent cause and prejudice for the default, or a showing of a fundamental miscarriage of justice would occur absent review.

In the instant case, Sabo has neither advanced an argument that might warrant a finding of cause for his procedural default, nor has he presented any evidence or argument that a fundamental miscarriage of justice would

occur absent review of these claims. In response to the Commonwealth's argument of procedural default, Sabo merely asserts that:

> By definition, however, the government's misconduct on appeal cannot be raised as a claim on direct appeal. Petitioner sought redress as a collateral claim directly to the Virginia Court of Appeals, the misled tribunal, which sent him back to the Circuit Court of Arlington County. Petitioner was released from custody and lost his ability to seek relief in Virginia courts. (Pet'r Reply at 2.)

It is clear that Sabo's assertion is insufficient to warrant a finding of cause for his procedural default.

Sabo appears to argue fundamental miscarriage of justice by asserting a claim of prosecutorial misconduct only recently discovered by Sabo, and thus unavailable at the time of his direct appeal. Specifically, Sabo argues that the Commonwealth's shift contradicted an earlier concession at trial only after "recognize[ing] the implications of this concession." According to Sabo, this difference in position would show that Sabo's confession was inadmissible because it taken by a government agent and not a private citizen as the Court of Appeals concluded. Sabo adds that:

> Because their deception went unnoticed, the government was never asked to explain their shift of position. Appellant counsel failed to bring this to the attention of the court as the petitioner only discovered it recently. This should not, however, permit the Commonwealth to intentionally argue facts they had previously conceded to be untrue. (Pet. at 5.)

As respondent correctly argues, Sabo had a full opportunity to present this issue to the Court of Appeals either at the time of the appeal, in a petition for rehearing, or in his petition for appeal to the Supreme Court of Virginia. Furthermore, the full trial transcript and questionable statements by the Commonwealth were fully available to the Court of Appeals

in considering Sabo's direct appeal, and the Court of Appeals opted to take its own view of the facts before it.[1] Sabo thus fails to establish that a fundamental miscarriage of justice would occur absent review of his claims, and claim (A) is dismissed.

B. Claim (C)

In claim (C), Sabo contends that his due process rights were violated when the trial court allowed the introduction of taped statements that were allegedly altered by the Commonwealth's witness. On direct appeal, the Court of Appeals of Virginia stated the following: "Appellant also contends admitting the tapes 'violated [his] Due Process Rights.' Appellant did not make this argument in the trial court; therefore, we will not address it for the first time on appeal. Rule 5A:18." Although the Supreme Court of Virginia rejected Sabo's appeal without comment, this Court can assume the denial of appeal was for the same reasons articulated by the Court of Appeals. See Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991). Because the Court of Appeals of Virginia refused to consider claim (C) under the contemporaneous objection rule, Virginia Supreme Court Rule 5A:18, respondent contends that this claim is procedurally barred from federal habeas review. Neither this Court nor the Fourth Circuit have held Virginia Supreme Court Rule 5A:18, which applies to the Court of Appeals of Virginia, to be an independent and adequate state procedural rule. But see Changler v. Angelone, No. Civ. A. 00-1128 AM, 2002 WL 32514958 (E.D. Va. Mar. 20, 2002) (Cacheris, J.) (unpublished) (finding Va. Sup. Ct. R. 5A:18 to be an independent and adequate state procedural rule).

[1] In discussing the instructions the police officer gave to the victim, the Court of Appeals found that "[a]lthough he suggested that she initially contact appellant for his immediate reaction to the incident with her car, expressly advised her not to contact appellant anymore after that time. Moreover, the initial phone conversation yielded no incriminating information." (Sabo, R. No. 0538-00-4, slip op. at 12.)

However, the Fourth Circuit has held that the substantially identical Virginia Supreme Court Rule 5:25, the contemporaneous objection rule applied in the Supreme Court of Virginia, is an independent and adequate state procedural rule. See Weeks v. Angelone, 176 F3d 249, 270 (4th Cir. 1999); see also King v. Dean, 955 F2d 41 (4th Cir. 1992) (unpublished) (affirming finding of procedural default by the district court for petitioner's failure to contemporaneously object pursuant to Va. Sup. Ct. R. 5A:18). Thus, claim (C) is procedurally barred unless Sabo can establish either sufficient cause and prejudice or that he is actually innocent.

With regard to cause, Sabo [provides no argument and merely reiterates that he presented this claim to the Supreme Court of Virginia. Sabo's failure to assert cause, therefore, renders claim (C) as procedurally barred from federal habeas review and as such must be dismissed.

Accordingly, because Sabo's claims (A) and (C) are procedurally defaulted, they may not be raised on federal habeas review and must be dismissed. As claims (B) and (D), were exhausted and not found to be procedurally defaulted, they must be considered on the merits.[2]

III. Standard of Review

Sabo's remaining claims must be reviewed on the merits under the standard set forth in 28 U.S.C. § 2254(d). When a state court has addressed the merits of a claim raised in a federal habeas petition, a federal court may not grant the petition based on the claim unless the state court's adjudications are contrary to, or an unreasonable application of, clearly established federal law, or are based on an unreasonable determination of the facts. 28 U.S. C. § 2254(d). The evaluation of whether a state court decision is

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[2] Although respondent initially argued claim (D) was not fully exhausted and are matters of state law, it is clear that Sabo raised the Due Process issue as to this claim during his state court appeal.

"contrary to" or "an unreasonable application of" federal law is based on an independent review of each standard. See Williams v. Taylor, 529 U.S. 362, 412-13 (2000). A state court determination meets the "contrary to" standard if it "arrives at a conclusion opposite to that reached by [the United States Supreme] Court on a question of law of if the state court decides a case differently than [the United States Supreme] Court has on a set of materially indistinguishable facts." Williams, 529 U.S. at 413. Under the "unreasonable application" clause, the writ should be granted if the federal court finds that the state court "identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. Moreover, this standard of reasonableness is an objective one. Id. At 410.

IV. Merits

A. Coerced Confession – Claim (B)

In Claim B, Sabo alleges that his confession was involuntary because it was coerced by the victim Lawrence, who was acting as a police agent at the time. In rejecting this claim on direct appeal, the Virginia Court of Appeals held that Lawrence was not a government agent:

> "Whether a person acted privately or as an agent of the state is a question of fact that must be decided on the circumstances of each case. Resolution of the agency issue 'necessarily turns on the degree of the activities.'" [Mills v. Commonwealth, 14 Va. App. 459, 463, 418 S.E.2d 718, 720 (1992)].
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> Relying on United States v. Feffer, 831 F.2d 734, 739 (7th Cir. 1987), we adopted in Mills "a two-part test for determining whether an individual was acting as an agent of the state while conducting a search." Mills, 14 Va. App. At 463, 418 S.E. 2d at 720. Under that test, a trail court looks at "(1) whether the government knew of and acquiesced in

> the search, and (2) whether the search was conducted for the purpose of furthering the private party's ends." Id. At 464-64, 418 S.E.2d at 720 (citing Feffer, 831 F2d at 739). "These [two] criteria help focus the trial court's attention o the significance and impact of the government involvement in a search." Id. At 464, 418 S.E. 2d at 720.[3] The United States Court of Appeals for the Ninth Circuit has referred to the second prong or factor relating to "the purpose of furthering the private party's ends" as "the intent of the party performing" the activity. United States v. Walther, 652 F2d 788, 792 (9th Cir. 1981) [omitted]. However, these two criteria or factors "should not be viewed as an exclusive list of relevant factors." Mills, 14 Va. App. At 464, 418 SE2d at 720. "Other factors include whether the private party acted at the request of government and whether the government offered a reward." United States v. Smith, 27 F. Supp. 2d 1111, 1115 (C.D. Ill. 1998) [citations omitted] . . . The determination of a private party's status, however, "can only be resolved 'in light of all the circumstances.'" Skinner, 489 U.S. at 614 (quoting Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971).

Sabo, R. No. 0538-00-4, slip op. at 10-13. In the instant petition, Sabo does not and cannot argue that the Supreme Court of Virginia's decision[4] was either contrary to, or an unreasonable application of, "clearly established" federal

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[3] Word addition in original.

[4] The Supreme Court of Virginia denied Sabo's petition for appeal without explanation, which is inferred as for the same reasoning as the Court of Appeals. Accordingly, this Court looks to the Court of Appeals' decision to determine the Supreme Court of Virginia's reasoning in denying the appeal. See Y2st, 501 U.S. at 803.

law, as determined by the Supreme Court of the United States.[5] 28 U.S.C. § 2254(d)(1).

As to the Supreme Court of Virginia's factual determination regarding Lawrence's actions as an allegedly government agent, Sabo cannot establish that the decision was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). The state court ruled as follows:

> [T]he evidence supports the trial court's determination that Lawrence did not act as an agent of the Commonwealth. The record fails to show that [Detective] Coale exercised influence or authority over Lawrence or that they worked together to achieve some common goal or plan. Lawrence was motivated by her sense of fear and a desire to identify her unknown antagonist. She wanted to end the harassment, and to that end, she ignored Coale's admonitions and independently telephoned appellant and engaged him in conversations, which she recorded. Coale never supervised Lawrence or directly her to do anything. In fact, after hearing some early taped conversations, Coale directed Lawrence not to contact appellant anymore because the conversations failed to implicate appellant or further the investigation. He exercised no control or

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[5] In discussing the use of questionably coerced confessions, the Supreme Court of the United States notes that "while each confession case has turned on its own set of factors justifying the conclusion that police conduct was oppressive, all have contained a substantial element of coercive police conduct." Colorado v. Connelly, 479 U.S. 157, 163-64 (1986). Thus, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause." Id. at 167. However, "[t]he most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause." Id. at 166 (emphasis added).

> authority over he and offered no payment or reward. Moreover, Lawrence and Coale did not share a common purpose or plan.
>
> Viewing all of the evidence and applying the relevant "agency" factors, we hold that the trial court's findings were not plainly wrong or without evidence to support them. Accordingly, the trial court did not err in finding that Lawrence was not a government agent.

Sabo, R. No. 0538-00-4, slip op. at 12-13.

Sabo argues that the state decision was an unreasonable determination of facts because it ignored that Lawrence was acting as a government agent because she was instructed to contact Sabo. Specifically, Sabo states the facts support an agency relationship because (1) Coale instructed Lawrence to call, (2) Lawrence threatened Sabo during that call, and (3) Sabo made his incriminating statements in fear of those threats. This is factually flawed because the record clearly shows that (1) Coale initially instructed Lawrence to contact Sabo; (2) the initial contact by Lawrence produced no incriminating statements and (3) after listening to the recording from the first conversation, Coale told Lawrence not to contact Sabo anymore because "the conversations weren't really going anywhere." Sabo, R. No. 0538-00-4, slip op. at 4-5.[6] As such, Sabo has presented no facts that have contradicted or negated the facts considered by the state court.[7] Thus, the Supreme Court of Virginia did not make an

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[6] Sabo even concedes that Coale told Lawrence not to make any additional calls. See Pet.'s Mem. Of P. & A. at 5.

[7] Sabo also provides reference to testimony in a state civil proceeding relating to the same facts underlying the instant petition. Because this evidence was never presented in a state habeas proceeding, it is not presentable in this Court absent a showing of "cause and prejudice." See Keeney v. Tamayo-Reyes, 504 U.S. 1, 11-12 (1992). Sabo has presented no case for a finding of "cause and prejudice" as this additional, albeit incomplete, material from a civil proceeding merely corroborates the original facts that Lawrence intended to give her recordings of Sabo to

unreasonable determination of the facts in finding Lawrence was not a government agent.

Moreover, even assuming arguendo that Lawrence was a government agent, the Supreme Court's finding that Sabo's confession was voluntary was neither an unreasonable application of federal law nor an unreasonable determination of the facts under 28 U.S.C. § 2254(d).[8] In support of his argument that Lawrence coerced his confession, Sabo presents a host of "threats and promises of immunity" Lawrence told him and which, he claims, led to his incriminating statements. In short, none of these facts, previously introduced during Sabo's trial, are terribly persuasive and do little even to suggest the state court made an unreasonable determination of the facts.[9] Of the threats of

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the police to assist in their investigation. See Pet. Mem. P & A. at 6. This does not show any prejudice to Sabo as it does not change the fact that at the time she recorded the incriminating statements, she was acting of her own volition as the police previously instructed her not to contact Sabo.

[8] It is well settled that convictions obtained with coerced confessions by government agents are inconsistent with "the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," Brown v. Mississippi, 2978 UY.S. 278, 286 (1936). The Fourteenth Amendment's Due Process Clause bars the use of coerced confessions obtained by a government agent because such intimidation renders the confession involuntary. See Colorado v. Connelly, 479 U.S. 157, 167 (1986); see also Miller v. Fenton, 474 U.S. 104, 109 (1985); Malloy v. Hogan, 37 U.S. 1 (1964) (holding the Fifth Amendment privilege against self-incrimination also applies to the states). In determining whether a confession is voluntary, courts should consider the totality of circumstances, see, e.g., Hayes v. Washington, 373 U.S. 503 (!963), including the setting of the confession obtained, details of the interrogation itself, and characteristics of accused, see Schneckloth v. Bustmonte, 412 U.S. 218, 226 (1973).

[9] In summary of these facts, Sabo states that Lawrence threatened (1) the loss of visitation rights to his daughter, (2) a false sexual harassment claim at his work, (3) disbarment, (4) damage to his state political appointment, (5) telling his ex-wife their relationship began before he

speaking to he ex-wife or issues relating to his access to his daughter, there has never been any indication that Lawrence had any control over his visitation rights and he was already divorced from his wife at the time. As for threats relating to his career, it appears unreasonable to think that a false claim of sexual harassment would prove more injurious to Sabo than confessing to a crime of violence. Finally, Lawrence was never in a position to offer immunity to Sabo from prosecution and, as the respondent correctly argues, "any practicing attorney would be expected to know it was not a decision to be made by a criminal victim but by a Commonwealth's Attorney." Resp't.'s Mot. To Dismiss at 24. Finally and most telling, however, is the fact that any threats or promises offered by Lawrence, regardless of their plausibility, were said as part of several lengthy conversations that ranged in emotion and levels of comforting and confrontation, thus diminishing their psychological impact on Sabo's will. As such, Sabo has presented no facts that have contradicted or negated the facts considered by the state court. Thus, the Supreme Court of Virginia did not make an unreasonable determination of the facts in finding Sabo's confession was voluntary. Accordingly, claim (B) must be dismissed.

B. State Evidentiary Challenge – Claim (D)

Sabo's claim (D) alleges the trial court's failure to admit Dr. Brantley's testimony at the suppression hearing violated his Due Process Rights. In rejecting this claim on direct appeal, the Virginia Court of Appeals construed this issue as a question of state evidentiary law and upheld the trial court's denial of admissibility because Dr. Brantley's opinion was not relevant. Specifically, the Court of Appeals found most telling the fact that Dr. Brantley's testimony was

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was separated. She also promised not to pursue a civil action or seek prosecution of him if he admitted to the crime. See Pet's Mem., of P & A, at 8.

to be limited to an expert opinion on Sabo's susceptibility to his will being overborne" instead of speaking to the clinical conditions suffered by Sabo. Sabo, R. No. 0538-00-4, slip. op. at 21. Furthermore, the Court of Appeals deemed that even if Dr. Brantley were permitted to testify to the overborne nature of Sabo's will, this would have been "both an improper comment on the earlier legal determination made by the trial court in the suppression motion and an invasion of the jury's function to determine whether appellant told Lawrence the truth when he made his admissions." Id. at 22 (citing Coppola v. Commonwealth, 257 S.E.2d 797, 803-804 (Va. 1979), cert. denied, 444 U.S. 1103 (1980); Patterson v. Commonwealth, 348 S.E.2d 285, 290 (Va. App. 1986).

In the instant petition, Sabo has provided no showing that the Supreme Court of Virginia's decision was either contrary to, or an unreasonable application of, federal law.[10] In support of his argument Sabo argues that under Crane v. Kentucky testimony concerning the psychological environment of a confession "can . . . be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence." 476 U.S. 683, 689 (1986). However, Sabo neglects to point out that the remainder of the Court's discussion concludes that "as with any other part of the prosecutor's case, a confession may be shown to be 'insufficiently corroborated or otherwise . . . unworthy of belief.'" Id. (quoting Lego v. Twomey, 404 U.S. 477, 485-86 (1972)). Because Sabo does not appear to contest the corroboration or unworthiness of his statement, in so much as he admitted to making the statements, his argument does not appear on point.

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[10] The Supreme Court of Virginia denied Sabo's petition for appeal without explanation, which is inferred as for the same reasoning as the Court of Appeals. Accordingly, this Court looks to the Court of Appeals' decision to determine the Supreme Court of Virginia's reasoning in denying the appeal. See Ylst, 501 U.S. at 803.

On the other hand, respondent correctly argues that the issue in this case is over the denial of introducing testimony speaking to the circumstances or credibility of a confession and not the voluntariness of the confession. In considering this distinction in Crane, the Court determined the "blanket exclusion of the proffered testimony about the circumstances of petitioner's confession deprived him of a fair trial." Id. at 690. Ultimately the Court focused on "the Kentucky courts err[ing] in foreclosing petitioner's efforts to introduce testimony about the environment in which the police secured his confession" in finding the state court violated the petitioner's constitutional rights. Id. at 691. However, at no point in Sabo's trial was he deprived of introducing testimony concerning the credibility and reliability of his confession, as required by Crane. The Court of Appeals found that "petitioner testified at length about his personal problems and his mental and emotional condition in 1988 and 1999," as well as "that he only admitted doing something because of [the victim's] persistent and relentless threats." Sabo, R. No. 0538-00-4, slip. op. at19, 20. In fact, the Court of Appeals specifically stated that "appellant did not attempt to attack the weight and reliability of the taped conversation" with Dr. Brantley's testimony. Id. at 21. Instead the court found that under state law, Dr. Brantley's testimony concerning the voluntariness of Sabo's confession was inadmissible because expert witnesses cannot render an opinion as to the veracity of statements at issue. Id. at 21-22 (citing Fitzgerald v. Commonwealth, 292 SE2d 798, 806 (Va. 1982); Pritchett v. Commonwealth, 557 SE2d 205, 208 (Va. 2002)). Thus, it appears that Sabo is arguing a portion of Virginia's evidentiary law is unconstitutional under Crane, but as discussed the instant facts do not support such an assertion and there is no basis for this Court to find the state court's decision to be an unreasonable application of federal law.

Moreover, this Court's scope of review is limited to questions of either the federal Constitution or laws, and it

may not reexamine a state court's interpretation and application of a state law, such as the evidentiary rule in the instant claim. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Wright v. Angelone, 151 F3d 151, 157 (4th Cir. 1998). Thus, claim (D) must be dismissed.

V. Conclusion

For the reasons stated above, this petition must be dismissed. An appropriate Order shall issue.

Dated: 3/21/05
Alexandria, Virginia

/s/ James C. Cacheris
UNITED STATES
DISTRICT JUDGE

Kevin Mark SABO
v.
COMMONWEALTH of Virginia
Record No. 0538-00-4.

Court of Appeals of Virginia
Alexandria

April 9, 2002

William R. Martin, Patrick O. Cavanaugh (Christopher B. Stone; Shawn m. Wright; Dyer Ellis & Joseph, on brief), Washington, DC, for appellant.

Eugene Murphy, Assistant Attorney General (Mark L. Early, Attorney General, on brief), for appellee.

Present: Judges BENTON, ANNUNZIATA and Senior Judge HODGES.

HODGES, Senior Judge.

The appellant, Kevin Sabo, appeals his conviction for attempted malicious wounding, in violation of Code §§ 18.2-26 and 18.2-51. Sabo contends the trial court erred in: (1) refusing to suppress tape-recorded statements he made to Heather Lawrence; (2) admitting those audiotaped statements at trial; and (3) refusing to allow Dr. Julian Brantley to testify. For the following reasons, we affirm.

BACKGROUND

Appellant and Heather Lawrence began a romantic relationship in the summer of 1998. The relationship became increasingly strained and in early March 1999, Lawrence ended it. Following the break-up, Lawrence began receiving anonymous phone calls. On March 16, 1999, Lawrence agreed to have lunch with appellant at a

local restaurant. The two had earlier discussed the "strange phone calls," and appellant showed concern, making Lawrence receptive toward maintaining a friendship with appellant. After lunch, Lawrence and appellant parted and returned to their respective offices. They did not see each other the remainder of that day or night.

Lawrence went out after work on March 16 unaccompanied by appellant and returned home during the early morning hours of March 17. She parked on a side lot near her townhouse. Around 9:00 am on March 17, 1999, Lawrence left her townhouse, entered her car and proceeded to drive to work. She approached a stop sign at an intersection and tried to stop her car; however, her brakes did not work. Lawrence "turned the car hard left, . . . hit a fence, a low brick wall and a tree." Lawrence recalled seeing fluid on the ground just before she entered her car.

Prior to trial, appellant moved to suppress the introduction of incriminating statements he made to Lawrence in a telephone conversation that Lawrence recorded and provided to police.

I. MOTION TO SUPPRESS STATEMENTS

Facts

On appeal from a trial court's denial of a motion to suppress, we must review the evidence in the light most favorable to the Commonwealth, granting to the Commonwealth all reasonable inferences fairly deducible front it. *Commonwealth v. Grimstead*, 12 Va.App. 1066, 1067, 407 SE2d 47, 48 (1991). The findings of the trial court will not be disturbed unless plainly wrong or without evidence to support them. *See Mier v. Commonwealth*, 12 Va.App. 827, 828, 407 SE2d 342, 343 (1991).

When reviewing the trial court's denial of a defendant's motion to suppress evidence, "the burden is upon [the defendant] to show that the ruling when the evidence is considered most favorably to the Commonwealth, constituted reversible error." *McGee v. Commonwealth*, 25

Va.App. 193, 197, 487 SE2d 259, 261 (1997)(*en banc*)(citations omitted).

Detective Coale investigated the March 17 incident involving Lawrence's car. He first met with Lawrence on March 19, 1999. In addition to her brake lines being cut, Lawrence advised him she had received "a number of [anonymous] phone calls to her residence in the middle of the night and at different times where people hung up and had not left a message." Coale learned from Lawrence that her relationship with appellant "had gone sour over the last several months" and that "[t]here had been an incident involving a slashing of one of her tires that coincided with a spat that her [sic] and Mr. Sabo had had." As a result, Coale "provided her with a tape recorder to tape anything that might – any phone calls that she might receive." He gave Lawrence the recording device about a week after first meeting with her. Coale testified that he "told [Lawrence] not to contact the defendant. That if he called and she wanted to make the tapes, that would be useful to our investigation."

Lawrence testified that she was extremely fearful after the March 17 car accident. She had no idea who placed the anonymous calls and sabotaged her brakes. She worried constantly about future acts against her, and she was afraid of being alone in her residence. As a result, she installed a security system, kept mace and a whistle on her person at all times, kept a baseball bat in her house and avoided being alone. Coale installed the tape recorder around March 24, 1999 and provided her with approximately six blank audiotapes, which she used to record several conversations with appellant. Lawrence testified that after Coale installed the tape recorder, he suggested that Lawrence call appellant to tape his reaction to her accident because Lawrence had not spoken with appellant after the accident.[1] Lawrence shared

[1] Although Lawrence's recollection on cross-examination differed from Coale's earlier testimony that he "told" Lawrence not to contact

the earliest recorded conversations with Coale, but he advised her not to contact appellant anymore because "[t]he conversations weren't really going anywhere." Despite that admonition, Lawrence contacted appellant periodically and taped more conversations. The evidence further showed that appellant continued to telephone Lawrence and speak with her, and Lawrence also taped portions of those conversations.

Appellant telephone Lawrence around 9:00 pm on April 20, 1999. That conversation ended around 1:00 am on April 21, 1999, and was the conversation in which appellant first made incriminating statements, the substance of which he sought to suppress. Lawrence taped excerpts of that lengthy conversation. Lawrence explained that she only had two audiotapes left to use, so she paused the machine and did not record portions dealing with innocent or personal information unrelated to Lawrence's fears for her safety. Lawrence also admitted recording over previously recorded portions when she needed additional tape. During the April 20-21 conversation, appellant admitted making anonymous phone calls to Lawrence and doing something to her car.

On the morning of April 21, 1999, Lawrence telephoned appellant at his office, hoping he would elaborate on his earlier admissions. Lawrence also taped that conversation. Appellant provided details about the incident involving her car. He explained that he went to a bar, became intoxicated, grabbed tools from his house, drove to her residence and did something to her car. Lawrence delivered the incriminating tapes to Coale at police headquarters on two successive days. Coale listened to one tape on April 21 and the other tape on April 22, 1999. He testified that "[a]fter she made this first tape, we told her just to leave it alone and go back home, and

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appellant, appellant did not call Coale as a witness and inquire into this apparent conflict. Moreover, the fact finder was not bound by either party's testimony and could believe that which is more favorable to the Commonwealth. See Eaton v. Commonwealth, 240 Va. 236, 249-50, 397 SE2d 385, 393 (1990).

we will see how the case develops." He also told her "that she didn't have to make any more tapes unless [appellant] called her . . . [yet] she went ahead and apparently made [the second tape] anyway, and she brought it in" on April 22, 1999. After hearing appellant's audiotaped admissions that he did something to her car, Coale obtained a search warrant.

The trial court admitted into evidence the audio cassette tapes of the two telephone conversations. In doing so, it focused its analysis on whether Lawrence "when she was speaking to the defendant and the defendant ultimately made admissions to her, whether or not she was an agent of the state . . . in connection with this action." Although the police provided and installed the equipment a month before the incriminating tapes were recorded, the police instructed Lawrence "not to call the defendant." After Lawrence provided the April 20 tape, Coale again instructed Lawrence not to call appellant. By ignoring those admonitions, the trial court found that Lawrence "acted on her own" in contacting appellant at various times. According to the trial court, Lawrence "did not follow the instructions of the Arlington police" when she initiated calls. After listening to the testimony and evidence, including the taped conversations, the trial court determined that Lawrence had a "separate and independent reason to find" out who was doing these things to her "wholly apart from whether or not there was to be any prosecution." She wanted to allay her fears and discover who was victimizing her. To that end, she wanted to either identify or eliminate appellant as a suspect.

Applying by analogy case law involving Fourth Amendment searches by private individuals, the trial court ruled that Lawrence's purpose was not to assist law enforcement to prosecute appellant but to further Lawrence's "own ends and goals," namely, a desire to identify and stop the person who was placing her in constant fear. The trial court further found that the Commonwealth had minimal and infrequent involvement in obtaining the taped statements.

Furthermore, the trial court ruled that, even if Lawrence were an agent, appellant's incriminating statements were voluntary and "were not the result of any coercion."

Analysis

Appellant puts forth two arguments regarding his incriminating statements. He contends (1) that Lawrence "was acting as an agent for the Commonwealth," and (2) his statements to her were involuntary "because they were the result of coercion, [and] threats and, thus, were observed in violation of his fifth and fourteenth amendment rights."[2]

a. Government Agent

We have not previously addressed the proper method for determining whether an individual is acting as an agent of the state in the context of the Fifth Amendment. However, we agree with the trial court's application of concepts and procedures employed in prior case law involving searches and seizures by persons alleged to be government agents. Therefore, we hold that the analysis employed to determine whether an individual acted as a state agent for Fourth Amendment purposes applies equally to situations involving alleged Fifth Amendment violations.

Accordingly, appellant bore the initial burden to establish that Lawrence acted as a government agent in obtaining his incriminating statements. See *Debroux v. Commonwealth*, 32 Va.App. 364, 371, 528 SE2d 151, 154 (2000)(alleging search by state actors; *see also Mills v. Commonwealth*, 14 Va.App. 459, 464, 418 SE2d 718, 720 (1992)(when defendant alleges search was conducted by state actor, it is defendant's burden to establish by

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[2] We note initially that appellant does not and cannot argue a Miranda violation because the warnings mandated by *Miranda v. Arizona*, 384 U.S. 436, 467-73, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966), intended to safeguard a defendant's Fifth Amendment rights, are required only when there is custodial interrogation. Because appellant was not in custody when he made the incriminating statements, *Miranda* warnings were not required.

preponderance of the evidence that private party acted as government instrument or agent); *Duarte v. Commonwealth*, 12 Va.App. 1023, 1025, 407 SE2d 41, 42 (1991)(involving search of dormitory room by school official).

In *Mills*, 14 Va.App. at 461, 418 SE2d at 719, Mills raised a Fourth Amendment challenge to a search conducted by a private individual, Barlow, who was hired by Mills' parents to repair a burglar alarm system in an Illinois home in which Mills resided. Barlow found incriminating evidence in the house and contacted local authorities, who contacted Virginia law enforcement authorities investigating a murder of a police officer. *Id.* at 462, 418 SE2d at 719. After learning of Mills' involvement in the Virginia crime, the local sheriff asked Barlow "'if he was going to go back in the [Mills'] residence, if he would observe and see if [the items he saw initially] were still there.'" *Id.* Barlow had not completed the job and had to return to Mills' residence. *Id.* While there, he again saw the incriminating items and reported his observations to the local sheriff, who obtained a search warrant base, in part, on Barlow's information. *Id.*

Mills contended Barlow acted as an agent of the police in conducting a warrantless search of his parents' house. *Id.* at 463, 418 SE2d at 720. We explained that "[t]he Fourth Amendment acts only as a constraint upon government or state action . . . Consequently, a private search, no matter how unreasonable, does not constitute a constitutional violation warranting suppression of the evidence seized." *Id.*

"Whether a person acted privately or as an agent of the state is a question of fact that must be decided on the circumstances of each case. Resolution of the agency issues 'necessarily turns on the degree of the Government's participation in the private party's activities.'" *Id.* (quoting *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 614, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989)). *See also United States v. Koenig*, 856 F.2d 843, 847 n.1 (7th Cir.1988) (holding that question is essentially one of fact, based on the

particular circumstances, but the factual inquiry is one guided by common law agency principles). Of critical importance, for an agency relationship between a private citizen and the government to exist, both parties must have manifested their consent to that relationship, either expressly or by necessary implication from their conduct. *Id.* While government knowledge of the private person's conduct obviously is critical, it is not enough, standing alone, to establish the requisite agency. *See United States v. Kinney*, 953 F2d 863, 865 (4th Cir.1992).

Relying on *United States v. Feffer*, 831 F2d 734, 739 (7th Cir.1987), we adopted in *Mills* "a two part test for determining whether an individual was acting as an agent of the state while conducting a search." *Mills*, 14 Va.App. at 463, 418 S.E.2d at 720. Under that test, a trial court looks at "(1) whether the government knew of and acquiesced in the search, and (2) whether the search was conducted for the purpose of furthering the private party's ends." Id. at 463-64, 418 S.E.2d at 720 (*citing Feffer*, 831 F2d at 739). "These [two] criteria help focus the trial court's attention on the significance and impact of the government involvement in a search." *Id.* at 464, 418 S.E.2d at 720. The United States Court of Appeals for the Ninth Circuit has referred to the second prong or factor relating to "the purpose of furthering the private party's ends" as "the intent of the party performing" the activity. *United States v. Walther*, 652 F.2d 788, 792 (9th Cir.1981) (challenging search by alleged agent). However, these two criteria or factors "should not b e viewed as an exclusive list of relevant factors." *Mills*, 14 Va.App. at 464, 418 S.E.2d at 720. "Other factors include whether the private party acted at the request of government and whether the government offered a reward." *United States v. Smith*, 27 F.Supp.2d 1111, 1115 (C.D.Ill.1998)(involving search); see also *United States v. Garlock*, 19 F.3d 441, 443 (8th Cir.1994)(defendant must show "the government exercised such coercive power or such significant encouragement that it is responsible" for the

individual's conduct); *Stone v. Wingo*, 416 F.2d 857, 860 (6th Cir.1969)(actions of private party are attributed to the state where "'parties act . . . together in pursuance of some design or in accordance with some scheme'"). The determination of a private party's status, however, "can only be resolved 'in light of all the circumstances.'" *Skinner*, 489 U.S. at 614, 109 S.Ct. 1402 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 487, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)).

Lawrence received anonymous phone calls, and someone cut her brake lines, causing her to fear for her safety. She explained in detail the state of fear in which she lived and the steps she took to protect herself from this unknown, yet real, threat. Detective Coale provided Lawrence with a tape recorder and blank tapes, and he showed her how to use it. Although he suggested that she initially contact appellant for his immediate reaction to the incident with her car, he expressly advised her not to contact appellant anymore after that time. Moreover, the initial phone conversation yielded no incriminating information.

Applying the above-described factors to the facts of this case, the evidence supports the trial court's determination that Lawrence did not act as an agent of the Commonwealth. The record fails to show that Coale exercised influence or authority over Lawrence or that they worked together to achieve some common goal or plan. Lawrence was motivated by her sense of fear and a desire to identify her unknown antagonist. She wanted to end the harassment, and to that end, she ignored Coale's admonitions and independently telephoned appellant and engaged him in conversations, which she recorded. Coale never supervised Lawrence or directed her to do anything. In fact, after hearing some early taped conversations, Coale directed Lawrence not to contact appellant anymore because the conversations failed to implicate appellant or further the investigation. He exercised no control or authority over her

and offered no payment or reward. Moreover, Lawrence and Coale did not share a common purpose or plan.

Viewing all of the evidence and plying the relevant "agency" factors, we hold that the trial court's findings were not plainly wrong or without evidence to support them. Accordingly, the trial court did not err in finding that Lawrence was not a government agent.

b. Voluntariness

After a party has satisfied his burden of proving "by a preponderance of the evidence" that an individual was an agent for the government, "the burden shifts to the Commonwealth to establish that the [contested actions] were constitutionally permissible." *Debroux*, 32 VaApp. At 371, 528 SE2d at 154 (citing *Mills*, 14 Va.App. at 464, 418 SE2d at 720).

> The Fifth Amendment provides that no person shall be deprived of life, liberty, or property, without due process of law. The admission of an involuntary confession violates due process. A confession will be found to be voluntary only if the government can demonstrate that, under the totality of the circumstances and by a preponderance of the evidence, it was not secured *by the government* through psychological or physical intimidation, but rather was the product of a rational intellect and free will.

United States v. D.F., 63 F3d 671, 679 (7th Cir.1995) (emphasis added).

"The test for voluntariness derives from federal constitutional law relating to the Fifth Amendment as applied to the States through the Fourteenth Amendment." *Rodgers v. Commonwealth*, 227 Va. 605, 609, 318 SE2d 298, 300 (1984). "Our courts have consistently held that the protections afforded under the Virginia Constitution are co-extensive with those in the United States Constitution." *Henry v. Commonwealth*, 32 Va.App. 547, 551 529 SE2d

796, 798 (2000) (quoting *Bennefield v. Commonwealth*, 21 Va.App. 729, 739-40, 467 SE2d 306, 311 (1996)). Therefore, our constitution provides no greater due process rights than those granted under the Fifth Amendment of the United States Constitution.

"Because only state action may violate a criminal defendant's due process rights, 'coercive police activity is a necessary predicate to the finding that confession is not "voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment.'" *Bottenfield v. Commonwealth*, 25 Va.App. 316, 323, 487 SE2d 883, 887 (1997) (quoting *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986)).

In *Connelly*, the United States Supreme Court explained that "the sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion. Indeed, the Fifth Amendment privilege is not concerned 'with moral or psychology al pressures to confess emanating from sources other than official coercion.'" 479 U.S. at 170, 107 S.Ct. 515 (quoting *Oregon v. Elstad*, 470 U.S. 298, 305, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985)). The Court noted that "[w]hile each confession case has turned on its own set of factors justifying the conclusion that police conduct was oppressive, all have contained a substantial element of coercive police conduct." *Id.* at 163-64, 107 S.Ct. 515. Thus, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Claus." *Id.* at 167, 107 S.Ct. 515. Moreover, "[t]he most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause." *Id.* at 166, 107 S.Ct. 515.

Because the evidence supports the trial court's finding that Lawrence was not acting as a government agent, the Due Process Clauses of the Fifth and Fourteenth Amendments are not implicated. Therefore, if police are not actively involved, a confession obtained by a private party is

deemed voluntary under the Due Process Clause of the Fifth Amendment, thereby obviating a voluntariness analysis. See id., at 167, 107 S.Ct. 515 (holding that coercive police activity is necessary predicate for finding that confession is not voluntary); *Commonwealth v. Cooper*, 899 SW2d 75, 75 (Ky.1995) (rejecting argument that state constitution or common law required suppression of a confession improperly obtained by private party); *Darghty v. State*, 530 So.2d 27, 31 (Miss.1988)(conduct by third party will not vitiate voluntariness confession); *State v. Carroll*, 138 N.H. 687, 645 .2D 82, 85 (1994)(holding that state constitution, which offered greater protection than federal constitution with respect to voluntariness, did not apply absent state action); *State v.McCullough*, 56 Wash. App. 655, 784 P2d 566, 568 (1990)(rejecting argument that state constitution applied where defendant confessed to victim). Consequently, the trial court did not err by denying appellant's motion to suppress his statements to Lawrence.

2. ADMISSIBILITY OF THE STATEMENTS

a. Admission of Audiotapes/Due Process

Appellant contends the "trial court erred in determining that audio taped statements made by Mr. Sabo were admissible when they contained erasures, edits and intentional deletions." He argues that the omission of certain portions of the conversations "required the trial court to find the statement involuntary and the tapes inadmissible." Because Lawrence was not a state actor, the issue of the voluntariness of appellant's confession is not an issue. Accordingly, we do not address this contention.

b. Foundation for Admission of Tapes

"The admissibility of evidence is within the broad discretion of the trial court, and a ruling will not be disturbed on appeal in the absence of an abuse of discretion." *Blain v. Commonwealth*, 7 Va.App. 10, 116, 371 SE2d 838, 842

(1988). "A proper foundation must be laid for the introduction of all evidence. The burden is upon the party offering real evidence to show with reasonable certainty that there has been no alteration or substitution of it." *Horsley v. Commonwealth*, 2 Va.App. 335, 338, 343 SE2d 389, 390 (1986); see also Charles E. Friend, The Law of Evidence in Virginia §13-5, at 467 (5th ed.1999).

Lawrence testified that the tapes contained a true and accurate rendering of the portions of the conversations taped. Although asserting that relevant portions of his conversations with Lawrence had not been taped, appellant conceded on cross-examination that he made the statements contained on the tapes. Lawrence explained that she would use a tape until it was full, then insert another tape. She also acknowledged pausing the recorder during some personal or unimportant conversations and taping over previous conversations when she needed additional tape and had no blank ones. However, there was no evidence that Lawrence or the police altered or tampered with the tapes. The fact that Lawrence did not tape her conversations *in toto* and that she taped over other conversations went to the weight and not the admissibility of the tapes. Lawrence was subjected to cross-examination regarding the tapes, and appellant was able to testify regarding statements made by the parties that were not recorded. Moreover, appellant explained in his testimony that Lawrence failed to record threats she made to him that prompted him to falsely admit tampering with her car. Accordingly, the trial court did not err in admitting the evidence.[3]

3. DR. BRANTLEY'S TESTIMONY

Appellant contends the trial court erred in refusing to allow the jury to hear the testimony of Dr. Brantley,

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[3] Appellant also contends admitting the tapes "violated [his] Due Process Rights." Appellant did not make this argument in the trial court; therefore, we will not address it for the first time on appeal. Rule 5A:18.

appellant's psychiatrist. He prefaces his argument by stating that "[t]he trial court's determination of admissibility does not preclude the defendant from proving at trial that those statements were involuntarily made."

At the suppression hearing, the trial court refused to allow Dr. Brantley to testify and render an opinion as to appellant's "mental condition" based on Dr. Brantley's "listening to those tapes." Appellant objected, stating, "it's essential that this expert be permitted to testify at least to the susceptibility of the defendant's being overborne." The trial court explained:

> I'm not gong to let him say I listened to the tapes, and based upon my understanding of them and my listening to them that his will was overborne.
>
> That's the only thing you can be asking about, and I am not going to let him testify about that. I've already ruled on that.
>
> I will be the one listening to the tapes and making the determination. And the issue, the testimony of this doctor should center around his visits with the defendant in March and April of 1999, what his condition was and what the treatment was and how that affected his daily life.

Appellant's attorney noted his exception to the trial court's ruling and proffered that Dr. Brantley listened to the tapes and would testify that he

> Talked with the defendant about the feelings that the defendant had while that tape was being made, and that the doctor would say with a reasonable degree of medical certainty that the defendant was overborne and that he would admit something that was not true . . . The doctor would certainly testify that he was more susceptible to being overborne and to making such an involuntary admission.

The trial court accepted the proffer but indicated "it will not be considered in the matter as evidence."

At trial, appellant testified at length about his personal problems and his mental and emotional condition in 1998 and 1999. He described the up-and-down, often volatile, relationship he had with Lawrence. He indicated that she continually threatened him when she did not get her way, warning him that she would contact his ex-wife and their former boss. Appellant explained that he suffered from depression and anxiety for which his doctor prescribed Prozac and Xanax. He denied doing anything to her car and testified that he only admitted doing something because of her persistent and relentless threats.

After appellant's testimony, appellant's attorney proffered "the direct testimony" of Dr. Brantley from the suppression hearing. In addition, he made the following proffer:

> The testimony would be that Dr. Julian Brantley saw and treated Kevin Sabo on March 12, March 22, March 29, April 7, April 13, and April 30 of 1999.
>
> In addition, he saw him and treated him on August 16, August 23, August 27. All in 1999.
>
> On the occasion of the August visits, Dr. Brantley will testify that he listened to the tapes . . . and that based upon his earlier treatment and meetings with Mr. Sabo in March and his review of the tapes in August, he would say with a reasonable degree of medical certainty that is it his opinion that the admissions were made by Mr. Sabo on the tapes that were played before the jury as a result of being overborne.
>
> And further, he would say with a reasonable degree of certainty that at the time the conversation occurred and the tapes were made that Mr. Sabo was susceptible to being overborne by Miss Lawrence for the reasons that he articulated in the testimony and for the reasons made in the proffer.

Because of the trial court's ruling that Lawrence was not a state actor, the issue of the voluntariness of appellant's

confession was no longer an issue at trial. Therefore, Dr. Brantley's opinion testimony about appellant's will being overborne was not relevant. Moreover, appellant testified in detail about his mental state and indicated that he only admitted wrongdoing to appease Lawrence and because of her serious threats. Therefore, Dr. Brantley's testimony would also have constituted an improper opinion as to the veracity of a witness. See *Fitzgerald v. Commonwealth*, 223 Va. 615, 630, 292 S.E.2d 798, 806 (1982).

Furthermore, appellant chose to limit Dr. Brantley's testimony to rendering an expert opinion of appellant's susceptibility to his will being overborne based on listening to the tapes. He never asked Dr. Brantley to explain to the jury the clinical conditions from which appellant suffered, his general mental condition, the amount and type of prescription drugs appellant took and the effect those drugs and personal events would have on a person with such a condition. In other words, appellant did not attempt to attack the weight and reliability of the taped conversation. *Cf. Pritchett v. Commonwealth*, 263 Va. 182, 187, 557 SE2d 205, 208 (2002)(holding expert testimony about defendant's mental disorder admissible so long as expert does not opine on the truth of the statement at issue). Instead, he chose to limit Dr. Brantley's testimony to rendering an expert opinion as to the voluntariness of appellant's statements based on hearing the tapes and speaking with appellant after the fact.

Finally, Dr. Brantley's opinion that appellant's will was overborne would have constituted both an improper comment on the earlier legal determination made by the trial court in the suppression motion and an invasion of the jury's function to determine whether appellant told Lawrence the truth when he made his admissions.

> Expert testimony concerning matters of common knowledge or matters as to which the jury are as competent to form an opinion as the witness is inadmissible. Where the facts and circumstances shown in evidence are such that men of ordinary

> intelligence are capable of comprehending then, forming an intelligent opinion about them, and drawing their own conclusions therefrom, the opinion of an expert based upon such facts and circumstances is inadmissible.

Coppola v. Commonwealth, 220 Va. 243, 252, 257 S.E2d 797, 803-04 (1979), *cert. denied*, 444 U.S. 1103, 100 S.Ct. 1069, 62 L.Ed.2d 788 (1980). *See also Patterson v. Commonwealth*, 3 Va.App. 1, 10, 348 S.E.2d 285, 290 (1986).

Accordingly, the trial court did not abuse its discretion in refusing to allow Dr. Brantley's testimony.

For the foregoing reasons, the judgment of the trial court is affirmed.

Affirmed.

BENTON, J., dissenting.

For the reasons that follow I would reverse the conviction and remand for a new trial.

I.

It is now well "recognize[d] that the government can exercise such control over a private actor that a 'private' action can fairly be attributed to the government for purposes of the . . . Fifth Amendment." *United States v. Garlock*, 19 F.3d 441, 443 (8th Cir. 1994). "Whether a private party should be deemed an agent or instrument of the Government for [Fifth] Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities, a question that can only be resolved 'in light of all the circumstances.'" *Skinner v. Railway Executives' Ass'n*, 489 U.S. 602, 614, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). In conducting this analysis, "the ultimate question whether a private person is actually a government agent . . . [is] a question that requires the application of a legal concept (agency) to facts." *United States v. Martin*, 195 F3d 961, 963 (7th Cir. 1999).

Employing the usual standard, this legal determination of agency is subject to de novo review on appeal. See *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996).

The evidence in the record established very clearly that the police initiated the process leading to the recording of Sabo's conversations with Lawrence, that the police provided Lawrence with a tape recorder so she could record her conversations with Sabo, that the police did so for the purpose of furthering their investigation, and that the police used Lawrence as their surrogate in effecting the ends of their investigation. The trial judge's conclusions that the "minimal" involvement of the police was insufficient to prove Lawrence was an agent of the police is not supported by the evidence.

The evidence proved that the only information the police had concerning the identity of the person who tampered with Lawrence's vehicle was Lawrence's suspicion that Sabo was involved. The police, however, did not contact Sabo. Instead, they decided to use Lawrence as the meaning of investigating Sabo's involvement. To facilitate the police investigation, the detective instructed Lawrence, who had left her apartment and was staying with her mother, to move back into her apartment. There, the detective supplied Lawrence with a tape recorder, which he had obtained from the police department. He installed the recorder on her telephone and tested it by making calls to the police communication section. Initially, he gave Lawrence six tapes, instructed her in the manner of recording, and told her to record conversations, "that would be useful to [the] investigation."

There is no conflict between Lawrence's trial testimony and the detective's. Lawrence testified that the detective knew Sabo had not contacted her after the accident and that the detective suggested she call Sabo to record his reaction to the accident. The detective testified, "I don't remember whether I told her specifically not to call him or

not." After Lawrence had recorded several of her conversations with Sabo from her home telephone and delivered them to the police, the detective gave her an additional recording device for use on her telephone at her place of employment. Thus, the government instigated Lawrence's activities and directed her use of the recorder for the specific purpose of eliciting admissions from Sabo.

This investigation to record Sabo's conversations was the brainchild of the police. Lawrence had not contacted Sabo after her accident and had not been contacted by him. No evidence proved Lawrence was pursuing any private interest. Indeed, she moved back to her apartment, where she had access to her telephone, solely at the suggestion of the detective. In doing so and making the recordings, she was vindicating the interest of the government and functioning in the manner directed by the government.

Furthermore, the police removed any technical barriers that Lawrence may have encountered in locating or installing the equipment. Te detective tacitly assured Lawrence that her conduct in recording the calls was lawful. By instructing Lawrence to initiate the first telephone call, the detective strategically set in motion the circumstance that generated return calls from Sabo to Lawrence. *Cf. Corngold v. United States*, 367 F.2d 1, 5-6 (9th Cir.1966) (noting that the government requested a private person to open a package in a particular person's possession). Moreover, when the police supplied the recording equipment, installed the device, furnished the tapes, and instructed Lawrence to call Sabo, Lawrence needed only to activate the record button and talk to Sabo. "The fact that the Government has not compelled a private party to perform [the questioned act] does not, by itself, establish that the [act] is a private one." Skinner, 489 U.S. at 615, 109 S.Ct. 1402.

The notion that Lawrence was not acting as a government agent because Sabo later initiated telephone calls to her is fanciful in view of the detective's initial direction to Lawrence to make the first call to Sabo.

Although the detective told Lawrence to make the call to judge Sabo's reaction, the inevitable and reasonably expected consequence of her telephone call was to initiate a dialogue with Sabo about the event that was the focus of the investigation. It is of minimal relevance to the inquiry that the detective told Lawrence not to initiate calls to Sabo after she made the initial call. When Lawrence followed the detective's instructions to place the initial call to Sabo, she set in motion the desired circumstances to cause return calls. Lawrence already had informed the detective of the nature of her relationship with Sabo and of Sabo's depression. Under those circumstances, who initiated the resulting calls after Lawrence made the first call has no bearing on the issue of whether Lawrence was a government agent.

Likewise, the notion that Lawrence somehow was acting on a private venture when she recorded the conversations with Sabo is not supported by the evidence. The detective installed the recording equipment on Lawrence's telephone. Thus, when Lawrence called to elicit conversation that she could record, she was acting well within the scope of the circumstances the detective set into motion. The detective made plain his preference for her initiation of the telephone dialogue. By telling Lawrence he wanted to get Sabo's reaction to the accident, he also undisputedly manifested that this was a means to obtaining incriminating admissions from Sabo. Indeed, after Lawrence delivered tapes of her conversations with Sabo, the police gave her another recording device to use on the telephone at her place of employment. We held in *Abunaaj v. Commonwealth*, 28 Va.App. 47, 502 SE2d 135 (1998), that a rape complainant who voluntarily made a telephone call to a suspect, which was recorded by the police, was acting in "compliance with police requests [, which] effectively made her an agent of the police." Id. at 54, 502 S.E.2d at 139.

I would hold that this record contains clear and unequivocal evidence of the government's encouragement, endorsement, and participation" in Lawrence's activity of

eliciting admissions from Sabo, and recording them. *Skinner*, 489 U.S. at 615-16, 109 S.Ct. 1402. This evidence was sufficient to prove she was a police agent and to implicate the Fifth Amendment.

II.

When the evidence proves that a private party has acted as a government agent in procuring evidence, the burden shifts to the government to prove the evidence was obtained by constitutionally permissible means. *Debroux v. Commonwealth*, 32 Va.App. 364, 371, 528 SE2d 151, 154 (2000). "It is without dispute that in Virginia the burden is upon the Commonwealth to prove that a confession is voluntary. *McCoy v. Commonwealth*, 206 Va. 470, 474, 144 SE2d 303, 307 (1965).

> The Fifth Amendment provides that no person shall be deprived of life, liberty, or property, without due process of law. The admission of an involuntary confession violates due process. A confession will be found to be voluntary only if the government can demonstrate that, under the totality of circumstances and by a preponderance of the evidence, it was not secured by the government through *psychological* or physical *intimidation*, but rather was the product of a rational intellect and free will.

United States v. D.F., 63 F2d 671, 679 (7th Cir. 1995) (emphasis added). The ultimate issue whether a statement is voluntary is a legal question. *Miller v. Fenton*, 474 U.S. 104, 110, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985).

The principle is well established that a promise to withhold prosecution in exchange for a confession is the type of duress that renders a statement involuntary. *See Hammer v. Commonwealth*, 207 Va. 135, 147-48, 148 S.E.2 878, 885 (1966). Likewise, threats to interfere with an individual's custody of a child as a means to elicit an admission will cause a confession to "be deemed not voluntary, but coerced." *Lynumm v. Illinois*, 372 U.S. 528, 534, 83 S.Ct.

917, 9 L.Ed.2d 922 (1963). In addition, "sympathy falsely aroused" is a factor in determining whether an induced confession is involuntary. *Spano v. New York*, 360 U.S. 315, 323, 79 S.Ct. 1202, 3 L.Ed2 1265 (1959).

Lawrence testified that she "was after an admission" and worked hard to elicit an admission. To induce Sabo to make admissions, Lawrence told him she "would not bring in law enforcement if he gave an admission." Lawrence testified that she was "giving [Sabo] an opportunity" to make an admission by promising not to pursue any criminal action. The tapes also disclose that Lawrence threatened to publicize her romantic affair with Sabo and threatened that the publicity could cause him to be "disbarred" and to lose his "political appointment." She promised to without her actions if he talked to her and admitted tampering with her vehicle. Explaining her calls, she testified about her conversations with Sabo as follows:

> I said, if this were to come out that you have done an illegal act, this could – like what we're facing right now – this could affect his career. This could affect his political appointment. This could affect his visitation with his daughter. Not that I wanted him to tell me that. But that if he told me what he had done, then I would go away, yes.

When Lawrence engaged in this activity, she knew Sabo had been diagnosed with depression and was taking medication to combat that illness. Pretending to be his confidant, she promised to "do whatever you need me to do to help you with this." She promised Sabo that if he admitted tampering with her vehicle she would not pursue civil or criminal charges. She also promised not to carry through on the threats to damage his personal, employment, or political life. It is self-evident that "[t]he government may not do, through a private individual, that which it is otherwise forbidden to do." *United States v. Feffer*, 831 F2d 734, 737 (7th Cir.1987).

I would hold that this evidence provided that Sabo's admissions were obtained by duress, threats, and sympathy falsely aroused and, thus, failed to prove Sabo's admissions were voluntary.

III.

I would also hold that the trial judge improperly excluded the testimony of Dr. Julian Brantley. While I agree with the majority opinion that portions of the proffered testimony of Dr. Brantley would have been improper, I disagree that all of Dr. Brantley's testimony was inadmissible.

On the day of trial, the prosecutor challenged whether Dr. Brantley's testimony was relevant to any issue at trial. In response, Sabo's attorney argued that "[t]he issue for the Court at the suppression hearing was the admissibility of the statements to be made," but that the issue remaining at trial was "the weight that [the statements] should receive." He then informed the judge as follows:

> Dr. Brantley would [testify] that . . . [Sabo] said what he said because he was depressed. He was suffering from acute anxiety disorder.
>
> And [,] he would testify as to the conditions that are accompanying those disorders, and that [Sabo] was overborne or more susceptible to being over borne than a normal person would have been.

After considering the arguments, the judge made the following ruling:

> I don't think Dr. Brantley can get up here and testify. I've certainly heard this testimony from before, that because of [Sabo's] condition what [Lawrence] said overbore his free will and therefore the statements were not made voluntarily.
>
> I think I've already ruled on that as a matter of law. And I don't think that it's an appropriate subject before the jury.

> He made the statements. Certainly, there's enough on those tapes from what I heard to indicate that is was not necessarily a spontaneous utterance.

During the trial, Sabo's attorney made an additional proffer. The trial judge simply noted the proffer for the record.

Citing *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986), the Supreme Court of Virginia recently reaffirmed the principle that "[w]hile the [trial judge] has the duty to determine whether [a defendant's] confession was voluntary, it is the jury's duty to consider its reliability." *Pritchett v. Commonwealth*, 263 Va. 182, 186, 557 S.E.2d 205, 208 (2002). Crane explicitly recognized the following principle:

> "[R]egardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any questions of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility."

476 U.S. at 689, 106 S.Ct. 2142. Thus, the defendant is entitled to have the jury consider circumstances bearing upon the weight to be given to his or her confession and its reliability. *Id.* In particular, and as pertinent to this case, the Supreme Court noted in *Crane* that "the . . . psychological environment that yielded the confession can . . . be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence. *Id.*

In *Pritchett*, the Supreme Court held that a defendant is "entitled to introduce admissible evidence to assist the jury in determining whether the confession was reliable." 263 Va. At 186, 557 S.E.2d at 208. Accordingly, the trial judge erred in ruling that because she had ruled on the issue of voluntariness, Dr. Brantley's testimony was not "an appropriate subject before the jury."

Furthermore, Dr. Brantley's testimony at the suppression hearing and the proffer of his testimony

establish that he was prepared to testify about Sabo's depression and the manifestations of his depression on his ability to function. "Expert testimony is admissible if the area of expertise to which the expert will testify is not within the range of the common experience of the jury." *Id.* at 186-87, 557 S.E.2d at 208. Portions of Dr. Brantley's testimony were offered particularly to explain to the jury the symptoms of Sabo's illness and to explain that the illness would cause Sabo to exhibit poor judgment.

Dr. Brantley testified at the suppression hearing that he had treated Sabo in March and April of 1999 and that his diagnosis was that Sabo "has a chronic depressive illness which was typical of depression." Dr. Brantley testified that Sabo's "depressive illness was characterized by depressed mood, sad mood, despondent mood, feelings of worthlessness, helpless, hopelessness, a very pessimistic outlook for the future, difficulties maintaining concentration and feelings of – unrealistic feelings of guilt, extreme feelings of guilt, often unrealistic in this case, as well as suicidal ideation." Dr. Brantley also said that "[a]s a symptom of his overall weakened state of mind, weakened by his depressive illness and anxiety, Mr. Sabo demonstrated to me impairments in his executive – what we call ego functioning. And poor judgment."

In addition, Sabo's attorney proffered at the suppression hearing that Dr. Brantley "would certainly testify that [Sabo] was more susceptible to being overborne and to making such an involuntary admission." At the trial, he added to the proffer that Dr. Brantley "further, . . . would say with a reasonable degree of medical certainty that at the time the conversation occurred and the tapes were made that Mr. Sabo was susceptible to being overborne by Miss Lawrence for the reasons he articulated in the testimony and for the reasons made in the proffer.

The testimony of Dr. Brantley concerned a matter that is beyond the normal province of a jury and was offered to explain to the jury Sabo's mental illness. His testimony

would have also given the jury an understanding of how Sabo's illness affected his susceptibility to the threats and intimidation. As the Court held in *Pritchett*, "an expert may testify to a witness's or defendant's mental disorder and the hypothetical effect of that disorder on a person in the witness's or defendant's situation." *Id.* at 187, 557 S.E.2d at 208.

The error in not permitting the expert to testify concerning Sabo's illness was not harmless error. Although Sabo attempted to describe his illness for the jury, his testimony did not have the same effect of an expert who could d more accurately explain Sabo's mental state and its effect on his functioning. Furthermore, while Sabo's statement and characterization of his illness may have been viewed by the jury as self-serving, Dr. Brantley's testimony and description of the illness would not have been so perceived and could have provided enhanced reliability for the jury to consider. Therefore, I would hold the judge committed reversible error in not allowing portions of Dr. Brantley's testimony.

IV.

For these reasons, I would hold that Lawrence was acting as an agent of the police when she recorded her conversations with Sabo and, further, that the evidence failed to prove Sabo's admissions were voluntary. In addition, I would hold that the trial judge erred in excluding Dr. Brantley's testimony. Accordingly, I would reverse the conviction and remand for a new trial.

THE RECORD FROM THE TRIAL COURT REGARDING THE ALLEGED AGENCY RELATIONSHIP

1. <u>The Arlington Police asked Lawrence to move back into her apartment so that a recording device could be installed on her telephone.</u>

Question: Following that interview on the night of the 19th, what if any requests did Detective Coale make of you as far as aiding in the investigation?

Lawrence: He asked me to move back into my apartment because I was staying with my mother. He asked me to tape any unusual conversations, and gave me – was going to later give me a tape recorder. And he said he was going to set up a surveillance camera somewhere along my street. But I didn't know where it was.

November 29, 1999 at 146-47.

"At the conclusion of that interview, Det. Coale asked Ms. Lawrence to move back into her apartment (she had moved out following the incident and was fearful living alone) ant to allow the police to set up a recording device on her home telephone to take any unusual calls she might receive. (trial transcript 11/20/99, p. 147)."

Brief in Opposition to Petition for Appeal, Commonwealth of Virginia, Theophani K. Stamos, Deputy Commonwealth's Attorney, Record No. 0538-00-4, at page 5.

2. The Arlington Police supplied Lawrence with a government tape recorder, installed it in her apartment, tested it through the police switchboard, and instructed her in its use.

Question: Where did the tape recorder come from?
Det. Coale: The police department.
Question: Do you have just a number of them for use?
Det. Coale: Yes, we – yes, we do.
Question: And where did this occur where you gave her the recorder?
Det. Coale: At her residence.
Question: And would you tell us whether or not you installed the recorder or if she did it?
Det. Coale: I did.
Question: And would you tell us what instructions you gave her with regard to its operation?
Det. Coale: To tape any –
Question: No. How it worked mechanically.
Det. Coale: We tested it with phone calls to our communication section and had them call back and made sure she knew how to work it.
November 3, 1999 at 15-16

Question: Who provided the tape recorder?
Lawrence: Detective Coale. The Arlington County police did, as well as several packets of tapes.
November 30, 1999 at 30.

Question: Did you turn over a tape-recording device later that week to her?
Det. Coale: Yes.
Question: And did you install that in her house?
Det. Coale: I did.
Question: Did you also provide some blank tapes to her?
Det. Coale: Yes.
November 29, 1999 at 268.

3. <u>The Arlington Police "instructed" Lawrence to contact Sabo</u>.

Question: Did there come a time when a tape-recording device was put into place at your apartment?

Lawrence: Yes. It was a couple days later. It was within four or five days.

Question: And how was that supposed to work?

Lawrence: If I received any odd phone calls, to record them. Likewise any voice mail messages. I was supposed to record them. And he asked me to tape record an initial conversation with Kevin.

November 29, 1999 at page 147.

Question: Did you have any specific instructions from Detective Coale about you making efforts to contact the defendant?

Lawrence: Only just to tape record the first conversation but not to contact him otherwise.

November 29, 1999 at page 149.

"The only instruction she received from Det. Coale concerning the taping of calls was 'to tape record the first conversation with [the defendant] but not to contact him otherwise.' (trial transcript, 11/29/99, p. 149)"

Brief in Opposition to Petition for Appeal, Commonwealth of Virginia, Theophani K. Stamos, Deputy Commonwealth's Attorney, Record No. 0538-00-4, at page 5.

4. Lawrence placed numerous telephone calls to Sabo as instructed by the police, and recorded their conversations.

Question: But he had told you that when you first got the recorder, didn't he?
Lawrence: What?
Question: Don't tape unless he called you?
Lawrence: I called him – when I first got the recorder, I called him. And I was told to call him, and I did.
Question: So you were told when you first got the recorder around March 24 that it was okay for you to call him?
Lawrence: That I can call him and tell him – because I hadn't talked to him since the accident. He wanted to tape his reaction.
Question: So Detective Coale said that it was okay for you to call him and to record those conversations?
Lawrence: Yes.
Question: When he first gave you the recorder, set it up at your apartment?
Lawrence: Right.
Question: And when was that it he told you that you should not call him?
Lawrence: Pretty much right after that. It wasn't going anywhere, the tapes. The conversations weren't really going anywhere.
Question: So the taped conversations started around March 24?
Lawrence: Around there, yes.

November 3, 1999 at page 58-59.

5. Lawrence had no contact with Sabo until instructed to do so by the police.

Question: So you were told when you first got the recorder around March 24 that it was okay for you to call him?

Lawrence: That I can call him and tell him – because I hadn't talked to him since the accident. He wanted to tape his reaction.

November 3, 1999 at page 58.

6. During the course of her first telephone conversation, Lawrence made a number of threats, demands for a cash payment, and promises not to pursue civil or criminal remedies.

Question: And would it be fair to say that every single threat that you made may not have been recorded on the tapes that you provided the police?

Lawrence: Most of the threats – it's fair to say, although most of the threats were in the first conversation, which are in their entirety and not taped over because I had enough tapes.

November 3, 1999 at page 61.

7. Lawrence's goal for obeying the police instructions was, inter alia, to support the "case" against Sabo and seek "justice."

Question: But getting back to my point, it is correct that you're the one that decided what parts of what conversations were going to be recorded. Is that correct?

Lawrence: That's your words, yes.

Question: Well, am I correct?

Lawrence: Well, I wasn't purposefully thinking – when I turned the tapes over, I didn't know what I was taping over. There could be something that was really close to an admission, and I just kept taping. I had no knowledge what I was taping over and what I wasn't. Whether it was personal information or maybe something that would have been valuable to the case, I had no idea.

November 29, 1999 at 200-201.

Question: So, did you want him to pay you $500?

Lawrence: I don't want anything. I want justice, period.

November 29, 1999 at 214.

"Although the victim might well have wished the prosecution of the defendant, her clear motive was to resolve the identity of the perpetrator and to end the harassing phone calls."

Brief in Opposition to Petition for Appeal, Commonwealth of Virginia, Theophani K. Stamos, Deputy Commonwealth's Attorney, Record No. 0538-00-4, at page 12.

8. Lawrence immediately took the tapes, as prearranged, to Arlington Detective John Coale.

Question: What did you do with those tapes after you completed – when you were finished with them?

Lawrence: I turned them over to Detective Coale.

November 3, 1999 at page 32.

9. Following their review of the initial conversations, Coale suggested Lawrence "leave it alone and see how the case develops," and he then said that she need not make any more tapes unless Sabo called her. The detective made no inquiries about Lawrence's threats and demands for cash made during the initial calls.

Question: So after she made the tape of August 20, sometime during that day, you told her what?

Det. Coale: We told her just leave it alone, that she didn't have to make any more tapes unless he called her. And she went ahead and apparently made this tape anyway, and she brought it in our attention the next day.

Question: Did you tell her any other thing, give her any other instructions?

Det. Coale: Not that I – no, not that I remember.

Question: Did you tell her not to make any threats?

Det. Colenso.

Question: Did you tell her not to make any promises about what she would do or not do?

Det. Coale: No.

November 3, 1999 at page 32.

10. Notwithstanding his suggestion to "leave it alone," Coale provided Lawrence with a second government-owned recorder and more blank tapes for her home and office.

Question: So the taped conversations started around March 24?

Lawrence: We didn't have a whole lot of conversation, you have to understand. And some of the conversations were at work. And for a period, I did not have a tape recorder at work. I did later get one.

November 3, 1999 at 59.

Question: Well, you were able to get more tapes from the police.

Lawrence: Two more, I believe, yeah.

November 3, 1999 at 61.

11. Lawrence placed additional calls to Sabo using the police-provided equipment.

Question: So after she made the tape of August 20, sometime during that day, you told her what?

Det. Coale: We told her just leave it alone, that she didn't have to make any more tapes unless he called her. And she went ahead and apparently made this tape anyway, and she brought it in our attention the next day.

November 3, 1999 at page 32.

12. Coale continued to meet with Lawrence about her new efforts to record conversations with Sabo, and he provided her with more blank tapes. He did not question her regarding her new efforts to contact Sabo.

Question: You received the tapes from her on two separate occasions?
Det. Coale: Yes.
Question: Where did you get them from her?
Det. Coale: At the police department.
Question: So she came to your office and dropped them off?
Det. Coale: Yes.
November 3, 1999 at 18.

Question: Well, you were able to get more tapes from the police.
Lawrence: Two more, I believe, yeah.
November 3, 1999 at 61.

Question: So after she made the tape of August 20, sometime during that day, you told her what?
Det. Coale: We told her just leave it alone, that she didn't have to make any more tapes unless he called her. And she went ahead and apparently made this tape anyway, and she brought it in our attention the next day.
Question: Did you tell her any other thing, give her any other instructions?
Det. Coale: Not that I – no, not that I remember.
Question: Did you tell her not to make any threats?
Det. Coale: No.
Question: Did you tell her not to make any promises about what she would do or not do?
Det. Coale: No.
November 3, 1999 at page 32.

13. Lawrence intentionally erased entire conversations.

Question: Could you tell the Court if there are any stops and starts on that, in the course of conversations that are taped in those recordings?

Lawrence: Absolutely.

Mr. Brent: Again, objection, Your Honor.

The Court: Overruled.

Lawrence: Yes there are.

Question: And why is that?

Lawrence: I was taping over conversations that I had because I didn't have enough tapes to tape all the conversations in its entirety. So I would just pop in another tape not knowing what was on that tape if I felt there was something I needed to tape.

November 3, 1999 at 34.

Question: My question is: The threats that you've testified to, and the conversation in which she was going to your wife or going to Governor Gilmore or something, were those threats made on that tape where you were very emotional?

Sabo: No. Some of them were. Some of them were not on the tape.

November 3, 1999 at 67-68.

14. In the telephone calls containing the incriminating statements, made only days after the initial call, Sabo was "in a complete panic that [she] had begun implementing her threats," he was "absolutely hysterical" and "talking about killing himself." Lawrence recorded these conversations in accordance with her instructions.

Question: Could you tell the Court if there was a phone conversation that was taped during that time frame?

Lawrence: Yes, there was.

Question: And how did that come about?

Lawrence: About 9 o'clock, a few minutes after 9 on the 20th, I received a phone call from Kevin, and he was panicked.

November 3, 1999 at 35.

Question: Well, don't you remember saying on the tape that if you will admit that you did it, I will do whatever I can to help you?

Lawrence: He called me – I think you are referring to the night of the 20th at 9 o'clock when he called me in a complete panic. And he accused me of going to his wife and telling her something, maybe about us. I'm not sure. He was absolutely hysterical, and I was trying to calm him down. And I told him I would do whatever I could to help him. And if he thought that I went to his wife or if there was something going on with that, that I would tell her otherwise.

November 3, 1999 at 46-47.

Question: Is there a time on the tape when he talks to you about being suicidal?

Lawrence: Yes.

Question: He was so distraught about the effect of your threats, potential threats?

Lawrence: No, that's not – again, if you listen to the tapes, he had called me and thought that I had called her, referring to his then-wife, they were separated. He thought I had called. And he said, if I lose Courtney, I will kill myself. I can't take it.

November 29, 1999 at 212.

THE RECORD FROM THE TRIAL COURT REGARDING THE COERCIVE EFFECT OF THREATS, PROMISES OF LENIENCY, AND DEMANDS FOR A CASH PAYMENT.

1. Lawrence promised not to involve the police if Sabo admitted to causing her accident.

Question: Did you tell him that you would not bring in law enforcement if he gave an admission?
Lawrence: Yes.
Question: Did you say that the information would stay among the four people, I guess you, your lawyer, some private investigator you talked about and him?
Lawrence: That's right.
November 3, 1999 at 49.

Question: Do you remember saying that you would not go to the police if the admission was given?
Lawrence: Yes
November 3, 1999 at 51.

Question: And you told him that the police had not been involved?
Lawrence: Yes, I did.
Question: Did you at one time tell him if he just admitted everything that you would turn everything over to him, and it would go away?
Lawrence: Yes, I did.
November 29, 1999 at 206.

2. Lawrence threatened to falsely tell Sabo's wife that their relationship began before they separated.

Lawrence: What threats? To call – you mean calling someone in Virginia –

Question: To call his wife, to affect his relationship with his child, to sue him civilly, criminally, to tell coworkers about his involvement in this and your relationship. You did all of those things, didn't you?

Lawrence: Yes.

November 3, 1999 at 55.

Question: Do you remember saying in the Wednesday morning conversation, it will come out about our affair and your wife will know. It will become public knowledge. Your visitation with you daughter can be hit because of this, you can be disbarred, and you can lose your political appointment because of this. You have so much to lose, Kevin.

Lawrence: Yes, but that was not Wednesday. That was actually Tuesday morning the 20th.

Nov. 29, 1999 at 209.

Question: Do you remember saying on one of the tapes that you admitted that you'd threatened Kevin by saying that you would tell his wife of your earlier affair, and he said, you've done that since the very beginning and that you agreed that you threatened in every fight you had?

Lawrence: I have threatened before to tell his wife that we had an affair. But I never have.

Question: Right. You made that threat before this accident, didn't you?

Lawrence: Oh, sure.

November 29, 1999 at 216.

3. Lawrence threatened to interfere with Sabo's visitation rights with his daughter, which were then being negotiated.

Lawrence: What threats? To call – you mean calling someone in Virginia –

Question: To call his wife, to affect his relationship with his child, to sue him civilly, criminally, to tell coworkers about his involvement in this and your relationship. You did all of those things, didn't you?

Lawrence: Yes.

November 3, 1999 at 55.

Question: Do you remember saying in the Wednesday morning conversation, it will come out about our affair and your wife will know. It will become public knowledge. Your visitation with you daughter can be hit because of this, you can be disbarred, and you can lose your political appointment because of this. You have so much to lose, Kevin.

Lawrence: Yes, but that was not Wednesday. That was actually Tuesday morning the 20th.

Nov. 29, 1999 at 209.

Question: Tell me your concern was. Not what she said.

Sabo: Well, my concern was that the rest of my daughter's life would be spent with a mother who was constantly reminding that her father was adulterer and abandoned her, for example.

Question: So, your concern was that, in this particular divorce proceeding, the unlikely occurrence would happen that the mother would try to poison the child against the father?

Sabo: I don't know what you mean by the unlikely occurrence of that happening, but that was my concern. It was the poisoning of the well and the –

Question: Thank you. I don't have anything else.

November 3, 1999 at 99-100.

Question: Tell us, if you would, when did you tell your wife you were cheating on her?

Mr. Brent: I object. Relevance?

Govt.: I think it's relevant because he's telling us how upset he was about this threat she was going to his wife Shelley, and we need to know when –

Court: Objection is overruled. I think it is relevant based upon the testimony regarding duress.

Sabo: I told my wife at the time that Heather and I had stopped seeing each other, that I had – begun a relationship when we had agreed to separate but before we were actually physically separated. And so that would have been early March.

Question: March of 1999?

Sabo: Yes.

Question: So, March of 1999 was the first time that your wife knew that you had been having an affair?

Sabo: I think she suspected, but yes.

Question: So, you told her in March that you had had a relationship with Heather Lawrence.

Sabo: Yes.

Question: And you were, on the night of April 20th into the early morning hours of April 21st, you were petrified about what?

Sabo: I think the petrification, if that's a word, wasn't about my ex-wife was going to find out. Miss Lawrence had long told me stories about how she had been scarred by the fact

that her father abandoned her family when she was about my daughter's age. And her threat was always that she was going to make sure that my daughter felt the same scars that she had felt.

Question: So, your answer is that the threat was that Miss Lawrence had done something to permanently scar your daughter Courtney. Is that correct?

Sabo: Yes.

Question: Any you've also testified that you were concerned, and in the tape you say you were concerned about your custody arrangement, and you were afraid you were going to lose your daughter.

Sabo: Yes.

Question: You never consulted with an attorney, did you, Mr. Sabo, about what would happen to your custody arrangement with your daughter having admitted that you had been cheating on your wife for a number of months?

Sabo: No. I was thinking suicide. Consulting an attorney was not the first thing on my mind.

Question: But you also stated that you were worried about losing Courtney.

Sabo: Yes.

Question: You didn't say you were worried about killing yourself at that point. Your fear was losing Courtney, wasn't it?

Sabo: And if I lost Courtney, I was going to kill myself, not call my attorney.

November 30 '999 at 454-457.

4. Lawrence threatened to seek to have Sabo terminated from his job by filing a false sexual harassment claim.

Question: Did you threaten to accuse him of sexual harassment at your former employers?
Lawrence: Again, it was bogus.
Question: It was bogus?
Lawrence: Yeah, all of it.
Question: Did you threaten to call his boss at Carmen Group? Did you threaten to call his boss at Carmen Group about this matter?
Lawrence: About – what was this matter? About him cutting my brakes?
Question: Yes.
Lawrence: Again, if it's on the tapes, probably.
November 3, 1999 at 60.

Question: What, if anything, did she threaten to you? with regard to making a sexual harassment charge as a result of your former employment?
Sabo: Again, to go back over how we met. We met when we were working together. It was uncomfortable because we were working together and people began saying rumors. My employer sat both Miss Lawrence and I down separately and told us that we were not to continue a relationship. So, it was at that time that we found another job for Miss. Lawrence. So, during the course of these conversations, she indicated it was her intent to contact my employer and file a sexual harassment claim against me from the time we met and worked together. Or, as she said, take other actions to get my butt out of a job.
November 3, 1999 at 46-47.

Question: And would you tell us what if any threats she made concerning your employment at the Carmen Group?

Sabo: Well, when the employer, Mr. Carmen, had learned that we were having a relationship, I was a relatively senior member of the staff. He did not believe it was appropriate that a senior member of the staff be dating somebody else on the staff. So he sat us down, and we lessened the degree to the relationship that we were together because he had told us that he found any relationship to be objectionable, and it was not to go forward. About that same time, I was helping her find another job which she eventually did get another job. And her threat was always that she could simply make a phone call back to Mr. Carmen and explain that we had, in fact, lied to him about the nature of the relationship. At one point, and I believe it's on these tapes, she actually threatened to file a sexual harassment suit. And I asked her then if she'd be willing to file a false suit, and she indicated that she could have had reason to believe that her job was in jeopardy.

November 30, 1999 at 399-400.

5. Lawrence threatened to damage Sabo's political reputation by making a false allegation to then Virginia Governor James Gilmore, his friend, that Sabo had refused to recommend her for a government board appointment until she slept with him.

Question: And you threatened to call the administration and tell them that the only reason that you were appointed to that board was because you slept together?

Lawrence: Maybe something like that. I don't remember.

November 3, 1999 at 55-56.

Question: Tell us whether or not she made any threats about exposing you to friends, relatives, people that you worked with?

Sabo: Miss Lawrence knew that I am very politically active throughout the Commonwealth of Virginia. I serve on a government board that Governor Gilmore had appointed me to, and I had helped her get appointed to a government board as well. So, she knew – it is my belief that she knew that my political reputation was very important to me. She made numerous comments about she was going to tell people about her accusations, suggesting to them that I was a stalker. She said that she was going to contact the Secretary of the Commonwealth, the Honorable Ann Patera, who is a close friend of mine, and tell Miss Patera that she wanted the Governor to know that I only made the recommendations for her to sit on a government board because I was sleeping with her.

November 3, 1999 at 57-58.

Question: What if any threats did she make to your reputation in politics?

Sabo: That was much of a lesser degree than my concern about the threats toward my child and the sexual harassment claim. But I am active politically throughout Virginia, have served on a number of statewide boards that the Governor has appointed me to and even had Miss Lawrence, through my recommendation, appointed to one of those boards. She had made several threats about ruining that reputation simply by telling her friends and other people that I was some sort of a stalker. And at one point she threatened to call the Secretary of the Commonwealth, the Honorable Ann Patera, and suggest that my recommendation was only based – I only made that recommendation after she had slept with me. I did not think she would carry that out, so that did not scare me so much. That didn't threaten me.

November 30, 1999 at 400-401.

6. Lawrence threatened to pursue false, unspecified charges with the bar association leading to Sabo's disbarment.

Question: Do you remember saying in the Wednesday morning conversation, it will come out about our affair and your wife will know. It will become public knowledge. Your visitation with you daughter can be hit because of this, you can be disbarred, and you can lose your political appointment because of this. You have so much to lose, Kevin.

Lawrence: Yes, but that was not Wednesday. That was actually Tuesday morning the 20th.

Nov. 29, 1999 at 209.

7. Lawrence promised not to bring civil charges against Sabo if he provided her the requested admission.

Question: Did you lie to him about the fact that you were not going to pursue this any further if he admitted the offense?

Lawrence: Yes.

Question: Did you tell him that you would mail him all the evidence if he would just confess?

Lawrence: I don't remember that, but it is conceivable that I may have said that.

November 3, 1999 at 46.

Question: Did you at one time tell him if he just admitted everything that you would turn everything over to him, and it would go away?

Lawrence: Yes, I did.

November 29, 1999 at 206.

Question: Did you threaten him with filing a civil or criminal suit against him?

Lawrence: Probably. Yes, I remember something along those lines.

November 29, 1999 at 211.

8. Lawrence told Sabo he "need[ed] to have his life fucked up a little bit.

Question: Mr. Sabo, tell us what all of these things, caused you – which of all of these things was the most important to you with regard to making a statement to her?

Sabo: They were all concerning me, especially because the tone of Miss Lawrence's remarks was getting more hostile. And the conversations went on, they literally went on for hours, as the tapes show. But at one point, if I can say it, verbally exploded, told me that – Your Honor, may I use the exact words?

Court: Yes, please.

Sabo: She indicated that maybe my life does need to be fucked up, that maybe she will contact my ex-wife. Or maybe she will have one of her friends contact my ex-wife. And again, she just made the reference back to the fact that she was going to make sure that my child relations were hurt. And it was the tone that she said it in. She was yelling, that I just went into a panic. I had called her that night thinking that she had already carried out that threat. And for her to actually say, "well, maybe I will call your ex-wife was just terrifying for me. I thought that my child would either be taken away, or at least the

relationship would be impacted by her allegations.

Question: Would it be fair to say that it was that along with the other promises and threats that she made that caused you make the admission?

Sabo: Yes, it would.

November 3, 1999 at 60-61.

9. Lawrence demanded a cash payment of $2,000.00 to end her harassment.

Question: Do you recall demanding that he pay you $2,000 for your inconvenience?

Lawrence: No. I said if he would give me – if he would pay me for my inconvenience, maybe we could – no, it wasn't a demand. I think we were talking about how to – if he could tell me – I don't know what tape this was – but if he would tell me what he did or something, and it was only a little bit of money, maybe he would want to pay for what – what you had done if you feel like you need to, or something along those lines because of the damage to my car and other –

Question: Well, do you remember asking him to pay you $2,000?

Lawrence: I think it was some kind of negotiation, bogus on my part negotiation.

November 3, 1999 at 51.

Question: Tell us whether or not a request that you pay her money had any effect on your statements that have been played before the jury today?

Sabo: So, we're not talking about the $50 for the key?

Question: No. No. I'm talking about the deductible and things like that.

Sabo: Yeah. Considering the incident with the key, it sort of solidified my thought at the time that she was seeking to either humiliate me or just get some money out of me. Especially with the $2,000 demand, we hardly even talked about it very long because I was so quick to say there's just no way. Later on she began saying, well, what about the deductible, and I said I'd think about it. But there was no intent beyond I wasn't going to let her squeeze me for more money.

November 30, 1999 at 427-428.

10. Lawrence encouraged him to embezzle it from the Virginia government through his position as a commissioner on the Commonwealth Transportation Board.

Question: What, if any, demands did she make upon you for the payment of money?

Sabo: If my memory of the conversation serves, it was on Wednesday morning she made a passing remark she would want a couple thousand dollars from me. That when I – like I said earlier, that her demands kept changing. At one paint it was a simply to make some sort of admission. And then later on it became an admission plus money. She indicated that she wanted a couple thousand dollars from me. I told her there was no way, and she sort of laughed it off and said she didn't really think she was going to get that. In the evening conversation, she talked about

at least paying the deductible. Again, I was amazed that she was –

Counsel: Objection as to his professed amazement.

Court: Sustained.

Question: Just tell us what she said.

Sabo: She indicated that she was having a difficult time making her deductible payment and therefore not getting her car back in time. She wanted me to give her $500. I indicated that even if I was prepared to give that to her, I did not have that money. She indicated that she knew that I received a stipend from the state government for the board I sit on. And all I would have to do would be to submit a false reimbursement claim to the state. And that would allow me to get the sufficient money to give her money for the deductible.

November 3, 1999 at 58-59.